Supreme Court, U.S.
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No. ____

In the
Supreme Court of the United States

NIBCO, INC.,

PETITIONER,

v.

MARTHA RIVERA, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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September 17, 2010

QUESTIONS PRESENTED

1. Whether under *Miller-El v. Dretke*, 545 U.S. 231 (2005), a court of appeals must conduct a comparative juror analysis when reviewing a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), even though the comparative analysis was neither raised before nor considered by the trial court below.

2. Whether a court of appeals that identifies a suspected *Batson* problem based on a comparative juror analysis never considered by the trial court can vitiate a 52-day trial without remanding to allow the trial court to consider the new arguments and evidence in the first instance.

RULE 14.1 STATEMENT

The following parties are not listed on the caption but participated in the proceedings below:

> Mao Her, Alicia Alvarez, Eva Arriola, Peuang Bounnhong, Chhom Chan, Bee Lee, Paula Martinez, Maria Medina, Mai Meemoua, Margarita Mendoza, Bao Nhia Moua, Isidra Murillo, Maria Navarro, Vath Rattanatay, Ofelia Rivera, Sara Rivera, Maria Rodriguez, Maria Ruiz, Maria Valdivia, Sy Vang, Youa Xiong, and See Yang.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that NIBCO, Inc. has no parent company. No publicly held corporation owns 10% or more of the stock of NIBCO, Inc.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 14.1 STATEMENT ii

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 4

JURISDICTION 4

CONSTITUTIONAL PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 5

A. Nibco's Fresno Irrigation Business 5

B. The Trial and Jury Verdict 7

C. Respondents' *Batson* Challenge 8

D. The Ninth Circuit's Decision 11

REASONS FOR GRANTING THE PETITION 16

I. The Court Should Grant Plenary Review To Clarify When Appellate Courts Should Conduct A Comparative Juror Analysis When Reviewing A *Batson* Claim. 17

A. The Lower Courts Are Split As To Whether Comparative Juror Analysis Is Mandatory. 18

B. The Ninth Circuit's Doctrinal Innovations Contravene This Court's Precedents. 22

1. The Ninth Circuit's Approach Relies On An Untenable Reading of *Miller-El II*. 23

2. The Ninth Circuit's Approach Subverts "Clear Error" Review And Violates Ordinary Principles Of Appellate Procedure 25

C. The Issues At Stake Are Important And Recurring 29

II. If The Court Does Not Grant Plenary Review, It Should Summarily Reverse The Ninth Circuit's Decision To Vitiate A 52-Day Trial Without Remanding For Consideration Of The *Batson* Claim In The First Instance 31

CONCLUSION 35

TABLE OF APPENDICES

Appendix A

Opinion of the United States Court of Appeals for the Ninth Circuit, dated March 29, 2010 ..... App-1

Appendix B

Jury Selection Proceedings before the United States District Court for the Eastern District of California, dated October 8, 2008 ..... App-10

Nibco's Voir Dire App-10

Additional Voir Dire App-27

Batson Rulings App-53

Appendix C

Verdict in the United States District Court for the Eastern District of California App-60

Special Verdicts of Trial Jury, dated November 26, 2008 ..... App-60

Judgment, dated December 1, 2008 ..... App-66

Appendix D

Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing and Rehearing En Banc, dated May 20, 2010 ..... App-67

TABLE OF AUTHORITIES

Cases

Amadeo v. Zant,
486 U.S. 214 (1988) 25

Anderson v. Bessemer City,
470 U.S. 564 (1985) 25, 26

Atwater v. Crosby,
451 F.3d 799 (11th Cir. 2006) 22

Barnes v. Anderson,
202 F.3d 150 (2d Cir. 1999) 34

Batson v. Kentucky,
476 U.S. 79 (1986) ..... passim

Boyd v. Newland,
467 F.3d 1139 (9th Cir. 2006) 18

Braxton v. Gansheimer,
561 F.3d 453 (6th Cir. 2009) 20

Christian Legal Soc'y Chapter of the Univ. of California v. Martinez,
130 S. Ct. 2971 (2010) 32

Cutter v. Wilkinson,
544 U.S. 709 (2005) 32

DeMarco v. United States,
415 U.S. 449 (1974) 32

Garraway v. Phillips,
591 F.3d 72 (2d Cir. 2010) 29

Golphin v. Branker,
519 F.3d 168 (4th Cir. 2008) 24

Hernandez v. New York,
500 U.S. 352 (1991) 8, 26, 33

Hightower v. Terry,
459 F.3d 1067 (11th Cir. 2006)..... 21, 22

Jackson v. Felkner,
No. 09-15379, 2010 WL 2933733
(9th Cir. July 23, 2010)..... 18, 29

Kesser v. Cambra,
465 F.3d 351 (9th Cir. 2006) 14, 19, 23

Lamon v. Boatwright,
467 F.3d 1097 (7th Cir. 2006) 21, 26

Miller-El v. Cockrell,
537 U.S. 322 (2003)..... 33

Miller-El v. Dretke,
545 U.S. 231 (2005)..... passim

Murphy v. Dretke,
416 F.3d 427 (5th Cir. 2005) 24

Purkett v. Elem,
514 U.S. 765 (1995)..... 17, 29

Reed v. Quarterman,
555 F.3d 364 (5th Cir. 2009) 20

Rice v. Collins,
546 U.S. 333 (2006)..... 27, 28

Riley v. Taylor,
277 F.3d 261 (3d Cir. 2001)..... 34

Rosales v. Dretke,
444 F.3d 703 (5th Cir. 2006) 34

Snyder v. Louisiana,
552 U.S. 472 (2008)..... 24, 25, 29, 33

Thaler v. Haynes,
130 S. Ct. 1171 (2010)..... 27

United States v. Arce,
997 F.2d 1123 (5th Cir. 1993) 21, 29

United States v. Cecil,
No. 08-5080, 2010 WL 3120027
(6th Cir. Aug. 10, 2010) 20

United States v. Davis,
609 F.3d 663 (5th Cir. 2010) 24

United States v. Hill,
146 F.3d 337 (6th Cir. 1998) 34

United States v. Joe,
928 F.2d 99 (4th Cir. 1991) 34

United States v. Katuramu,
No. 04-3633, 2006 WL 773038
(6th Cir. Mar. 28, 2006).....20

United States v. Montgomery,
210 F.3d 446 (5th Cir. 2000) 27

United States v. Odeneal,
517 F.3d 406 (6th Cir. 2008) 19

United States v. Olano,
507 U.S. 725 (1993).....28

United States v. Rudas,
905 F.2d 38 (2d Cir. 1990).....27

United States v. Taylor,
509 F.3d 839 (7th Cir. 2007) 33

United States v. Torres-Ramos,
536 F.3d 542 (6th Cir. 2008).....20, 33

Wainwright v. Witt,
469 U.S. 412 (1985).....26

Woodward v. Epps,
580 F.3d 318 (5th Cir. 2009) 20, 21

Wright v. Harris County,
536 F.3d 436 (5th Cir. 2008) 21, 29

Yakus v. United States,
321 U.S. 414 (1944) 28

Statutes

28 U.S.C. § 2254(d)(1) 24

Other Authorities

5A J. Moore & J. Lucas,
Moore's Federal Practice (1982) 32

Fed. R. Civ. P. 52(a) 26

PETITION FOR CERTIORARI

In this case a panel of the Court of Appeals for the Ninth Circuit vitiated a 52-day jury trial by second-guessing a trial court's findings under *Batson v. Kentucky*, 476 U.S. 79 (1986), based on new arguments and evidence never raised or addressed below. The court of appeals did not just spot an unpreserved issue and decide to send the case back to a trial court intimately familiar with the jury selection process. Instead, the Ninth Circuit wiped out more than 10 weeks of jury proceedings without the courtesy of a remand. That result is so fundamentally at odds with this Court's precedents, and so contrary to basic notions of proper appellate procedure, that it should not be allowed to stand. The Court's intervention is required to correct the Ninth Circuit's improper doctrinal departures. It is also needed to provide much-needed clarity on an issue over which the lower courts are deeply divided and confused—namely, under what circumstances an appellate court should engage in comparative juror analysis when reviewing a trial court's findings that a party's race-neutral reasons for striking a juror are not pretextual.

This case involves a manufacturing plant owned by petitioner NIBCO, Inc. ("Nibco") that, in 1998, laid off several unskilled workers as part of a broader (ultimately unsuccessful) effort to fix operational problems that were causing the plant to lose millions of dollars each year. One of the reasons the workers were let go is that they had been assigned to production-level positions with the lowest-skilled duties after failing a test designed to

evaluate basic job knowledge and competence. Respondents are a group of those former employees who brought discrimination claims against Nibco, alleging that they were terminated on the basis of their national origin.

At jury selection, Nibco exercised four peremptory strikes against jurors who, among other things, had stated that they or persons close to them had suffered from workplace discrimination or termination. Because three of the jurors were Hispanic, respondents challenged the strikes as racially motivated under *Batson*. That challenge was rejected by the district court, which found that the strikes were not motivated by race and were not purposefully discriminatory. The case then proceeded to trial, which lasted 52 days with more than 30 witnesses and hundreds of pages of documentary evidence. At the end of this lengthy trial, the racially diverse jury unanimously rejected respondents' claims and ruled in Nibco's favor.

Unsatisfied with the jury's verdict, respondents appealed to the Ninth Circuit, raising new arguments supported by new evidence, and urging the court to undertake a new "comparative juror analysis" that was never advanced in or addressed by the district court. Most courts to have reached the question have held that, if arguments in support of a *Batson* challenge are not properly preserved, the arguments are forfeited and may not be raised on appeal. But the Ninth Circuit ruled that a "comparative juror analysis" is always "required on appeal" even when it is "not requested or attempted below." App. 3. Then, instead of giving appropriate deference to the trial court's rejection of the *Batson*

challenge actually raised, the Ninth Circuit effectively evaluated the issues *de novo* based on its own selective reading of the cold record. It concluded that, in its view, Nibco purposefully discriminated in striking one of the jurors, "TG." And it reached this conclusion even though Nibco reasonably explained that it had stricken TG because she had a sister who had been fired, she had previously served on a hung jury, she had filed a worker's compensation claim against her employer, and she had volunteered views about her former employer suggesting that she would not be sympathetic to Nibco's position.

Even more troubling, instead of remanding to the trial court to consider the "comparative juror" evidence that respondents raised for the first time on appeal, and giving the trial court the opportunity to bring to bear its first-hand observations and credibility determinations in evaluating Nibco's reasons for striking TG, the Ninth Circuit simply ordered a new trial. The Ninth Circuit's decision to wipe out the results of a 52-day trial without the courtesy of remanding, on an issue the trial court is in a particularly good position to judge, is plainly improper and inconsistent with basic notions of appellate procedure. If the Court does not grant plenary review, it should summarily reverse.

OPINIONS BELOW

The unpublished memorandum disposition of the court of appeals reversing and remanding for a new trial is reproduced at App. 1. The order of the court of appeals denying rehearing and rehearing en banc is reproduced at App. 67.

The district court's October 8, 2008 bench ruling denying respondents' *Batson* challenge is reproduced at App. 53–58.

JURISDICTION

The court of appeals rendered its decision on March 29, 2010, and denied a timely petition for rehearing and rehearing en banc on May 20, 2010. App. 67. On July 30, 2010, Justice Kennedy extended the time for filing a petition for certiorari to and including September 17, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the U.S. Constitution reads: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This case involves a manufacturing facility in Fresno, California that in the late 1990s was losing millions of dollars each year. Nibco's efforts to save the business resulted in layoffs that ultimately spawned this lawsuit.

A. Nibco's Fresno Irrigation Business

In 1995, Nibco acquired and merged two struggling irrigation businesses in Fresno, California. *See* Ninth Circuit Excerpts of Record ("EOR") 280. Shortly after the acquisition, Nibco discovered serious operational problems at one of the manufacturing plants. Those problems included dysfunctional quality controls, deficient safety policies and practices, inadequate equipment, and poor employee training and skills. Injuries were rampant, technology was outdated, materials were often contaminated because of employee error, and inventory processes were wasteful. EOR 852.

The inefficiencies and operational problems stemmed, in large part, from poor communication between supervisors and workers who lacked necessary training and skills. No less than six languages—English, Spanish, Cambodian, Vietnamese, and two dialects of Hmong—were spoken on the plant floor. *Id.* Even within departments and shifts, workers often shared no common language. Employees thus relied heavily on non-verbal gesturing or on other workers to translate, a practice that disrupted other workers' regular duties. *Id.*

These problems were resulting in steep losses—nearly $3 million in 1996, and over $7 million a year

later. EOR 852–853. Nibco therefore decided to make significant investments in both the plant and its workers in an attempt to turn around the failing business. It overhauled quality controls, implemented a new computerized production system, and began classifying employees by skill level and assigning shifts accordingly. *Id.* In the fall of 1997, Nibco provided its employees with new training materials and administered a series of pass/fail tests designed to ensure that its employees satisfied minimum requirements for job knowledge and competence. EOR 853.

The tests required a basic sixth-grade English ability and were administered to all workers. EOR 852; 2008-10-09 Tr. at 33:10, 38:5–6. The overwhelming majority of the plant's 127 employees were Hispanic and Asian. EOR 852. A majority of the employees passed the tests. EOR 853. A small subset of employees, including respondents, failed them. Respondents were nonetheless given a second and (in some cases) even a third opportunity to take and pass the tests. *See* 2008-10-09 Tr. at 37:16–18.

The employees who failed the tests were assigned to production-level positions with the lowest-skilled duties, but with no reduction in pay or benefits. EOR 853. When the plant continued to hemorrhage money in 1998, however, those lowest-skilled employees were the first to be laid off. By November 1998, Nibco had been forced to reduce its workforce by 60 employees. *Id.* at 37:5–6. Of the 127 employees at the plant, 67 employees (of whom 55 were Hispanic or Asian) survived the layoffs. *Id.* at 37:11–12. Less than a year later, in August 1999,

Nibco sold the plant and closed its Fresno operations. EOR 283, 853.

B. The Trial and Jury Verdict

In October 1999, 23 Hispanic and Southeast Asian former employees with limited English proficiency brought national origin discrimination claims against Nibco under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the California Fair Employment and Housing Act, Cal. Gov't Code §§ 12940 *et seq.* They alleged that the pass/fail tests were discriminatory and that Nibco should have undertaken the significant expense of hiring translators and purchasing "computer-based translation software" to accommodate respondents' primary languages (Spanish, Hmong, Laotian, and Cambodian). *See* EOR 302, 875, 883.

On October 8, 2008, after a lengthy interval involving an interlocutory appeal on a preliminary discovery issue, the case went to trial. The parties brought forth over 30 witnesses and introduced hundreds of exhibits into evidence. EOR 504–831. On November 26, 2008, after a 52-day trial, the jury returned a unanimous verdict in Nibco's favor and rejected respondents' claims. The jury found by a preponderance of the evidence that Nibco's tests did not have a "disproportionate adverse effect in causing the lay off of Hispanic and Asian employees." App. 60. It further found that Nibco established by a preponderance of the evidence that the tests were "job related and necessary to its business" and that no "alternative employment practice ... would have accomplished the business purpose equally well." App. 64.

C. Respondents' *Batson* Challenge

1. Jury selection took place on October 8, 2008. After the district court's voir dire, the available jury members consisted of 16 Caucasians and five Hispanics. Counsel for both sides then engaged in further questioning and exercised peremptory strikes. Respondents struck five jurors (all of whom were Caucasian); Nibco struck four jurors (one Caucasian and three Hispanics). The final jury thus included two Hispanic jurors.

2. Respondents challenged Nibco's strikes against the three Hispanics—prospective jurors "TG," "RG," and "L"—as racially motivated under *Batson v. Kentucky*, 476 U.S. 79 (1986). Under *Batson*'s familiar test, respondents had the heavy burden to prove that Nibco's race-neutral reasons for striking the three jurors were pretextual and that Nibco's peremptory strikes were purposefully discriminatory. *See Hernandez v. New York*, 500 U.S. 352, 358–59 (1991).

Responding to the charge that it had "disproportionately target[ed] Latino people ... to try to remove them from the jury," Nibco provided race-neutral explanations for each strike. App. 49. For example, RG had indicated that her mother, with whom she was very close, was discriminated against at work and continued to speak of that experience. *See* App. 22 (noting that she had discussed her mother's experience "[d]uring the time when it was happening more so than now"). Similarly, L had indicated that both his parents were unemployed, and that his father had been laid off "because of no hours." App. 57.

Nibco gave four reasons for striking juror TG: *First*, TG's sister had been fired by her employer. *Second*, TG had previously served on a hung jury. *Third*, TG had filed a worker's compensation claim against an employer. *Fourth*, TG had expressed positive feelings about a former multi-lingual employer (Frito Lay), gushing in response to a question about her *current* employer that Frito Lay was a "great company" that was "very diverse" with "all different kinds of races" and emphasizing that the employees "all speak different languages" and that the supervisors "spoke different languages also." App. 43; *see also* App. 50 ("[S]he worked in a workplace with many languages, never had a problem. Loved Frito Lay ...."). In addition, in trying to remember his notes on TG, Nibco's counsel initially suggested that, like RG, one of TG's family members had suffered discrimination, but then corrected himself: "Her sister was fired. Her sister had an -- you know, problems with discrimination. Or not --." App. 50; *see also id.* ("I got to remember my notes").

In arguing to the district court that Nibco purposefully discriminated, respondents attempted to rebut *only* the first and fourth reasons for the strike. They argued that Nibco's first reason was irrelevant, arguing that RG "was specifically asked if there was any reason that she could not be fair given [the firing of] her sister" and "said no." App. 51–52. They argued that the fourth reason displayed "bias," objecting to Nibco counsel's "words" in referring to TG's praise of a workplace "where there's more than one language spoken." App. 52. Respondents did not address TG's experience with a hung jury, or TG's filing of a worker's compensation

claim. Nor did respondents complain that Nibco's counsel had mistakenly stated that TG's sister had suffered discrimination. And respondents did not offer or refer to any record evidence relating to other venire-persons to support their position.

2. The district court held that, "[o]n the totality of circumstances," Nibco had a non-discriminatory basis for striking TG and respondents had not carried their burden to prove purposeful discrimination. App. 56. The court noted that TG had filed a worker's compensation claim and that TG had a sister "apparently involved in a termination issue." App. 55. The court also reasoned that, in light of respondents' claims and "the fact that the supervisors are multilingual and she said that worked very well in the workplace" for a multi-lingual employer, there was a rational basis to worry that TG "could impose that experience where she said it was, in effect, a wonderful work environment." *Id.* Being in the best position to judge the credibility of Nibco's explanation for the strike and make first-hand observations, the court concluded that it did not "see this as anything having to do with race." *Id.* The court stated that "quite frankly, it's management versus labor and this is a person who's been making claims against her employer, herself, her sister's involved in a discrimination claim." *Id.*

3. The district court likewise ruled that respondents had not carried their burden to prove that Nibco had purposefully discriminated in striking RG and L. The court noted that RG's mother had been involved in a racial discrimination claim and apparently continued to struggle with the

issues. The court added that RG appeared "very, very quiet" and "in 17 and a half years as a trial judge, she is one of the oddest prospective jurors I've ever seen." App. 53–54. Similarly, L lived with his father who had recently been laid off due to a lack of work. The court was persuaded that those facts were "sufficiently analogous" to the facts of the case, which involved layoffs resulting from a slowdown in business. App. 57. Accordingly, the court determined that Nibco's race-neutral reasons for striking each juror were not mere pretexts for purposeful discrimination.

D. The Ninth Circuit's Decision

1. Respondents requested reassignment to the same Ninth Circuit panel that five years earlier had sided with respondents in an interlocutory appeal over a protective order in discovery proceedings. Although the two appeals were unrelated and did not involve the same issues, and even though reconvening the first panel would require recalling an out-of-Circuit senior judge, the Ninth Circuit granted respondents' motion. The appeal was thus assigned to a panel consisting of Judge Reinhardt, Judge Hawkins, and Sixth Circuit Judge Siler (sitting by designation). *See* App. 1.

On appeal, respondents sought to introduce, in the form of an "appendix," 20 juror questionnaires (as well as a new declaration) that they had never relied on or argued in raising their challenges below. Relying heavily on the new appendix, respondents argued for the first time that Nibco's stated reasons were "shot through with factual misrepresentations." Appellants' Br. 38 n.26. Respondents further argued that comparative juror

analysis based on the questionnaires purportedly indicated that Nibco treated TG, RG, and L differently from other jurors with similar characteristics or experiences.

2. In a divided opinion, the Ninth Circuit concluded that the district court had "clearly erred" in holding that Nibco's reasons for striking TG were not pretexts for purposeful discrimination. App. 2. The memorandum opinion, joined by Judges Reinhardt and Hawkins, stated at the outset that the appellate court would "review the district court's ruling *in light of [its] review of the juror questionnaires*." App. 4 (emphasis added). Although respondents had the burden to prove purposeful discrimination, the majority flatly rejected any suggestion that respondents were precluded from pursuing arguments on appeal that they "did not specifically point out below." App. 3. There was no forfeiture, the majority reasoned, because *Batson* requires the district court to evaluate proffered race-neutral reasons for strikes in the context of the record as a whole, and "a comparative juror analysis is required on appeal, even when, as in this case, it was not requested or attempted below." *Id.*

The court of appeals found what it characterized as "major flaws" in Nibco's proffered reasons for exercising its peremptory challenge. App. 4. The court took issue with the district court's statement that TG's sister had filed a discrimination claim, even as it acknowledged that Nibco's counsel had said "Or not" when mentioning the issue. The court concluded that TG had never said that she loved working in a multi-lingual environment—only

that she loved her former workplace, and that the workplace had been multi-lingual. *Id.* Even though the issue was never raised by respondents, the court of appeals further held that comparative juror analysis undermined any emphasis on TG's worker's compensation claim because four white jurors had also filed worker's compensation claims and were not stricken. *Id.*

The Ninth Circuit then turned to two of Nibco's reasons for striking TG that respondents had also not challenged and that the district court had therefore not reached: TG's "jury experience" and her "sister's dismissal." App. 5. Again invoking comparative juror analysis, the court of appeals determined that TG's jury experience did not distinguish her from "[t]hree white jurors" who "had previous jury experience" and were not stricken. *Id.* The court did not acknowledge or address Nibco's explanation that, unlike the other jurors, TG had served on a *hung* jury. Then, making its own assumptions, the court of appeals opined that TG would not have been biased by her sister's dismissal because "TG believed that" the firing "was her sister's own fault." *Id.*

The Ninth Circuit then proceeded to address the strikes of RG and L, even as it acknowledged that neither strike established that Nibco had intentionally discriminated. The judges expressed skepticism over the relevance of RG's mother's involvement in a discrimination suit, suggesting that RG's bare statement that her mother had "moved on" rather than file a discrimination claim meant that Nibco's reasons for striking RG were suspect. App. 7 n.4. The court likewise questioned

the emphasis on L's father's being laid off, finding insufficient evidence "regarding how Juror L felt about it." App. 6. Both criticisms, in the court's view, undermined Nibco's "credibility with respect to its reasons for striking Juror TG." App. 7 & n.4.

Because its concerns rested on its own cold-record credibility determinations, which depended on new arguments and evidence raised for the first time on appeal, one would have expected the Ninth Circuit to remand to the district court to consider whether the new arguments and evidence would have affected its determination that Nibco's strike of TG did not have "anything ... to do with race." App. 55. The district court, after all, presided over voir dire and was in the best position to judge matters of credibility. The Ninth Circuit instead took the drastic step of nullifying the 52-day trial—about a fifth of the district court's annual work product—and ordering a new one. The Ninth Circuit gave little reason for this radical remedy, except to assert that "just one racial strike calls for a retrial." App. 6 (quoting *Kesser v. Cambra*, 465 F.3d 351, 369 (9th Cir. 2006) (en banc)).

3. Judge Siler dissented, disputing the majority's holding that respondents had carried their burden to show that the district court "clearly erred" in finding that Nibco's reasons for striking TG were not pretexts for discrimination. App. 8. Judge Siler noted that, although Nibco's counsel had mistakenly stated that TG's sister had problems with discrimination, he had "corrected the mistake." *Id.* Moreover, the suggestion that TG "loved working in a diverse workplace" was likely "a subjective thought by counsel" based on TG's

statements that she worked in a diverse workplace and that her former employer was a great employer. *Id.* Nibco's reasons for striking TG were legitimate, not a pretext for discrimination. App. 9.

Judge Siler also criticized the majority's reliance on comparative juror analysis for "comparing apples to oranges." App. 8. Noting that it was pertinent that TG had filed a worker's compensation claim, Judge Siler indicated that it meant little that non-Hispanic jurors had also filed such claims when they lacked "the overall mixture of criteria related by Nibco." *Id.* Judge Siler chastised the majority for comparing, in isolation, TG's previous service on a hung jury with other non-Hispanic juror questionnaires, which indicated juror service, but not service on a hung jury. As Judge Siler explained, the trial court is best-positioned to evaluate the state of mind, demeanor, and credibility of the parties, and its judgment was "entitled to more deference than was allowed by the majority." App. 9. Looking at the totality of circumstances, Judge Siler concluded that the district court could not be said to have "clearly erred" in accepting Nibco's stated reasons for striking TG and holding that respondents had not proven purposeful discrimination. *See id.*

Over the vote of Judge Siler, the court of appeals denied the motion for panel rehearing. The court of appeals also denied rehearing *en banc*. This petition followed.

REASONS FOR GRANTING THE PETITION

The Court should grant plenary review to correct the Ninth Circuit's failure to conduct a proper *Batson* analysis and its radical re-interpretation of established precedents. Plenary review is needed because the decision below is illustrative of widespread confusion and disagreement among the lower courts over the extent to which side-by-side comparisons of white and non-white venire-persons are required in reviewing a trial court's denial of a *Batson* challenge. In particular, as described below, the courts of appeals are deeply divided over the extent to which "comparative juror analysis" should be considered when that analysis has not been raised before or considered by the district court. This petition thus provides the Court with an opportunity to clarify the reach of its prior references to comparative juror analysis, and to provide much-needed guidance on this critical and commonly recurring issue.

Alternatively, if the Court does not grant plenary review, it should summarily reverse. Whatever the role of comparative juror analysis on appeal, it should not be used to vitiate a 52-day jury trial without first giving the trial judge an opportunity to address issues with which he has first-hand familiarity. This was not a habeas case. The district court judge who presided over the voir dire was available to consider issues raised for the first time on appeal and to bring to bear his greater familiarity with the facts. Vitiating the jury trial without remand was a clear departure from the proper course of appellate review. Only a remand for further proceedings would accord with basic

principles of appellate procedure and the well-established deference that appellate courts owe to trial court credibility determinations. If left uncorrected, the decision below threatens to upend settled limits on appellate fact-finding and to encourage the improper use of *Batson* challenges to subvert adverse jury verdicts.

I. The Court Should Grant Plenary Review To Clarify When Appellate Courts Should Conduct A Comparative Juror Analysis When Reviewing A *Batson* Claim.

This Court has generally declined to spell out precise guidelines for *Batson*'s "step three" inquiry—that is, whether the proffered explanations for a peremptory strike are a pretext for "purposeful racial discrimination." *Purkett v. Elem*, 514 U.S. 765, 767 (1995). Although *Batson* urged trial courts to "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,'" it did not mandate any "particular procedures" for ferreting out pretext. *Batson*, 476 U.S. at 93, 98.

In *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"), however, the Court pointed to "comparative juror analysis" as "powerful" and "probative" evidence of pretext. *Id.* at 241, 247 n.6. The Court then undertook "side-by-side comparisons" of black and non-black venire-panelists to determine whether the prosecutor had intentionally discriminated. *Id.* at 241. The Court explained that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful

discrimination to be considered at *Batson*'s third step." *Id.* The Court also examined the "contrasting *voir dire* questions" posed to black and non-black panelists. *Id.* at 255. Based in part on that analysis, the Court concluded that the prosecution's race-neutral reasons for the strikes were implausible and the state court had clearly erred in finding no discriminatory intent.

In the wake of that decision, and as described below, there has been broad uncertainty over what the "powerful," "probative" nature of comparative juror analysis means in practice for trial courts conducting *Batson* step-three inquiries. This uncertainty, in turn, has spawned broad confusion over whether *appellate* courts are required to undertake comparative juror analysis in reviewing *Batson* step-three findings, or whether ordinary rules of fact-finding apply.

A. The Lower Courts Are Split As To Whether Comparative Juror Analysis Is Mandatory.

The courts of appeals have splintered over (i) whether comparative juror analysis is a mandatory component of the trial court's *Batson* step-three inquiry, and (ii) whether appellate courts are required to undertake a comparative juror analysis even when the issue is not relied on below and the trial court has failed to complete an analysis in the first instance.

At the very outermost extreme is the Ninth Circuit. The Ninth Circuit has made unequivocally clear that comparative juror analysis is mandatory in evaluating *Batson* challenges. *See Jackson v.*

Felkner, No. 09-15379, 2010 WL 2933733, at *1 (9th Cir. July 23, 2010); *Boyd v. Newland*, 467 F.3d 1139, 1145 (9th Cir. 2006) (citing *Miller-El II*, 545 U.S. at 231). In fact, the Ninth Circuit has held that a comparative juror analysis "is required *on appeal*" in all cases, "even when ... it was not requested or attempted below." App. 3 (emphasis added); *Kesser v. Cambra*, 465 F.3d 351, 361 (9th Cir. 2006) (en banc); *see also id.* at 377 (Rymer, J., dissenting) (objecting that "[n]o evidence was presented, no arguments were offered, no findings were sought" for comparative analysis below).

In the decision below, the Ninth Circuit followed this approach, relying heavily on juror questionnaires that had not been cited to or argued before the trial court to complete its own comparison of TG and empanelled white jurors. The court of appeals concluded that Nibco had purposefully discriminated based in part on the court's conclusion that several white jurors had also filed worker's compensation claims and had previous jury experience—even though respondents never addressed this evidence nor advanced any argument at all about juror comparisons before the trial court. App. 4–5. Under the Ninth Circuit's view, comparative analysis is thus mandatory for *both* trial and appellate courts and cannot be forfeited.

The Sixth Circuit has taken a different approach, urging that comparative juror analysis should be conducted by trial courts but also recognizing that the issue, like virtually every other, may be forfeited. In its view, *Miller-El II* established that the "district court's consideration of the totality of circumstances surrounding a strike

should include ... a comparison between the affected juror as well as others who went unchallenged." *United States v. Odeneal*, 517 F.3d 406, 420 (6th Cir. 2008) (emphasis added); *see also United States v. Torres-Ramos*, 536 F.3d 542, 559 (6th Cir. 2008). Accordingly, when a district court has attempted a comparative juror analysis in the first instance, the Sixth Circuit has considered juror questionnaires on appeal that it believed were required to conduct a complete analysis and then remanded for a re-do of the comparisons. *See Torres-Ramos*, 536 F.3d at 560.

Unlike the Ninth Circuit, however, the Sixth Circuit has also suggested that where the parties have not advanced arguments based on a comparative juror analysis, the arguments are forfeited and the district court is not obligated to conduct its own analysis *sua sponte*. *See United States v. Cecil*, No. 08-5080, 2010 WL 3120027, at *5 (6th Cir. Aug. 10, 2010); *Braxton v. Gansheimer*, 561 F.3d 453, 464–65 (6th Cir. 2009); *United States v. Katuramu*, No. 04-3633, 2006 WL 773038, at *3 (6th Cir. Mar. 28, 2006). Accordingly, where the district court has not attempted the analysis, the appellate court also need not. As the Sixth Circuit has explained, "when a district court conducts comparative juror analysis, it is under an obligation to get it right" but the "district court's failure to undertake it is not necessarily reversible error." *Cecil*, 2010 WL 3120027, at *5.

The Fifth Circuit has adopted yet another approach. The Fifth Circuit has held that in *capital* cases, as in *Miller-El II*, comparative juror analysis is mandatory and not subject to forfeiture. *See*

Woodward v. Epps, 580 F.3d 318, 337 (5th Cir. 2009); *Reed v. Quarterman*, 555 F.3d 364, 372–73 (5th Cir. 2009) (in capital case, *Miller-El II* imposes onus on the court, not the parties, to conduct a comparative juror analysis). At the same time, the Fifth Circuit has indicated that in *non-capital* cases comparative juror analysis is not required if it has not been raised in the district court. *See Woodward*, 580 F.3d at 337 (citing *Wright v. Harris County*, 536 F.3d 436 (5th Cir. 2008); *United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993)).

In contrast, the Seventh Circuit has narrowed *Miller-El II* to its facts, suggesting that nothing in the opinion makes comparative analysis mandatory for either district or appellate courts. In *Lamon v. Boatwright*, 467 F.3d 1097 (7th Cir. 2006), the Seventh Circuit upheld a district court's step-three evaluation as sufficient even where—as the dissent pointed out—the district court had made no attempt at side-by-side comparisons. Lamon's case, it explained, was "nothing like *Miller-El II* where a side-by-side comparison ... [led] the Court to conclude that the prosecutor's explanation 'reeks of afterthought.'" *Id.* at 1102; *cf. id.* at 1104 (Rovner, J., dissenting) ("majority distinguishes *Miller-El* on the grounds that we have no side-by-side comparison" when "the trial court engaged in no step-three analysis"). The Seventh Circuit reasoned that so long as the prosecutor's reasons are "honest, even if possibly mistaken," *Batson*'s third step is satisfied. *Id.* at 1102.

Going still further, the Eleventh Circuit has squarely held that comparative juror analysis is not mandatory for either district or appellate courts *and*

that such analysis may be forfeited. In *Hightower v. Terry*, 459 F.3d 1067, 1071–72 (11th Cir. 2006), the court reinstated a denial of a *Batson* claim that this Court had vacated and remanded for reconsideration in light of *Miller-El II*. The Eleventh Circuit expressly held that it was not required to undertake a comparative juror analysis because *Miller-El II* had done so only on account of the unusual "augmented record" before the Court—Miller-El had supplemented the record on habeas with juror questionnaires without objection from the State. *Id.* at 1069, 1071; *see also id.* at 1076 n.6 (Wilson, J., dissenting). Absent that unusual situation, the Eleventh Circuit will consider only "'the evidence presented in ... the proceeding in which the *Batson* objection is raised.'" *Id.* at 1070 & n.6; *see also Atwater v. Crosby*, 451 F.3d 799, 807 (11th Cir. 2006) (declining to consider comparative juror analysis not presented to trial court).

The precise role of comparative juror analysis in *Batson* step-three inquiries and appellate review is thus the subject of a messy, deep, and well-established split in authority. This Court's review is needed to bring clarity and consistency to this important area of the law.

B. The Ninth Circuit's Doctrinal Innovations Contravene This Court's Precedents.

This Court's review is also warranted because the Ninth Circuit's outlier position goes well beyond this Court's *Batson* precedents and runs counter to well-established principles of fact-finding, forfeiture, and appellate procedure.

1. The Ninth Circuit's Approach Relies On An Untenable Reading of *Miller-El II*.

The Ninth Circuit's decision contends that in *Miller-El II* this Court "made clear that the comparative analysis is required even when it was not requested or attempted in the state court." *Kesser*, 465 F.3d at 361. But *Miller-El II* "made clear" no such thing. In fact, the Court's caveats in *Miller-El II* suggest a far more nuanced and limited understanding of when a comparative juror analysis is required.

In comparing the questioning of black and non-black panel members, *Miller-El II* acknowledged that its comparative analysis rested on juror questionnaires that had been lodged in the habeas record. The Court pointed to the State's acquiescence to, and even reliance on, the lodged juror questionnaires and emphasized that "[w]e have no occasion here to reach any question about waiver." 545 U.S. at 256 n.15; *see also id.* (adding that the State "would fare even worse" if the Court excluded the materials). That unusual, augmented record before each of the habeas courts in *Miller-El II* has been widely cited as confirmation that the decision should not be misinterpreted to establish a new and unusual rule making a component of *Batson* review immune from ordinary principles of forfeiture. *See Hightower*, 459 F.3d at 1069 (unless such augmented record present, normal forfeiture rules apply); *Kesser*, 465 F.3d at 386 (Rymer, J., dissenting).

Indeed, contrary to the Ninth Circuit's conclusions, *Miller-El II* could not have intended to

establish comparative juror analysis as a new mandatory component of *Batson* given its posture on habeas. Had the Court believed that it was establishing a *new* procedural rule, it could not have applied that rule to Miller-El. *See* 28 U.S.C. § 2254(d)(1) (habeas petitions shall not be granted unless the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law"). Instead, *Miller-El II* made clear that it was "simply following clearly established federal law as AEDPA requires"; it was not "alter[ing] *Batson* claims" or "craft[ing] a new legal standard." *Golphin v. Branker*, 519 F.3d 168, 186 (4th Cir. 2008); *see also United States v. Davis*, 609 F.3d 663, 693 (5th Cir. 2010) (denying that *Miller-El II* "change[d] controlling law" governing review of peremptory challenges) (citing *Murphy v. Dretke*, 416 F.3d 427, 439 (5th Cir. 2005)). The Court's comparative juror analysis was simply a "powerful" means of illustrating the specific *Batson* violation at issue. *Miller-El II*, 545 U.S. at 241.

Similarly, this Court's recent decision in *Snyder v. Louisiana*, 552 U.S. 472 (2008), treated comparative juror analysis as illustrative of a *Batson* violation but eschewed any suggestion that comparative juror analysis is mandatory. The Court reasoned that its suspicions about the prosecutor's proffered rationale for striking a black juror—*i.e.*, the juror's "conflicting obligations"—were "reinforced" by a comparison of white jurors who had disclosed similarly conflicting obligations. *Id.* at 483. But the Court pointedly noted the dangers of a "retrospective comparison of jurors based on a cold appellate record ... when alleged similarities were not raised at trial," acknowledging that "an

exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." *Id.* Nonetheless, no such dangers were present, it explained, because the conflicting obligations issue had been "thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." *Id.*

Even in its decisions invoking comparative analysis, then, this Court has emphasized that it has not reached or resolved any question of forfeiture. To the contrary, this Court has suggested that undertaking comparative analysis in the first instance "on a cold appellate record" may be "very misleading." *Id.* Because the Ninth Circuit has taken the position that, under this Court's precedents, a comparative juror analysis is mandatory and non-forfeitable, intervention is particularly warranted.

2. The Ninth Circuit's Approach Subverts "Clear Error" Review And Violates Ordinary Principles Of Appellate Procedure.

The Ninth Circuit's approach also fundamentally subverts the deferential nature of "clear error" review. Under that standard of review, "'[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573–574 (1985)). A federal appellate court must give "due regard ... to the opportunity of the trial court to

judge of the credibility of the witnesses." Fed. R. Civ. P. 52(a).

This Court has emphasized that a trial court's decision on the ultimate question of discriminatory intent under *Batson* is entitled to "great deference upon appeal." *Hernandez*, 500 U.S. at 364. Deference to the trial court makes particular sense because the finding "largely turn[s] on evaluation of credibility," *Batson*, 476 U.S. at 98 n.21, and "variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson*, 470 U.S. at 575 (citing *Wainwright v. Witt*, 469 U.S. 412 (1985)). As long as "'there are two *permissible* views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.'" *Hernandez*, 500 U.S. at 369 (emphasis added) (citation omitted).

The trial court's findings here could not be said to be "clearly erroneous." The Ninth Circuit held otherwise only by imposing a heightened burden on the district court radically out of step with this Court's precedents. In reviewing the race-neutral reasons for striking TG, the district court was required to consider "whether the proffered rationale has some basis in accepted trial strategy.'" *Miller-El II*, 545 U.S. at 247. That is exactly what it did. App. 55 ("quite frankly, it's management versus labor"). The district court, moreover, was charged with ultimately focusing on "the *honesty*—not the accuracy—of a proffered race-neutral explanation." *Lamon*, 467 F.3d at 1101. And "[d]etermining whether the reason offered is an honest one turns on in-person credibility assessments which clearly the district court is in the

best position to make." *United States v. Montgomery*, 210 F.3d 446, 453 (5th Cir. 2000); *see also Thaler v. Haynes*, 130 S. Ct. 1171, 1175 (2010) ("the best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor").

The Ninth Circuit thus claimed "clear error" only by wholly second-guessing the trial court's assessments of credibility and demeanor anew—assessments that were notably detailed and fully reasoned, spanning seven pages of the trial transcript. EOR 253–259. The court of appeals, for example, found the suggestion that TG "loved" working in a multi-lingual environment to be clear error only by brushing aside TG's effusive exclamations, straining to parse the transcript, and relying on its own assumptions about TG's likely meaning. It also took issue with the Nibco's counsel's mistaken suggestion that TG's sister had filed a discrimination claim only by disregarding counsel's immediate correction of that misstatement. *See* App. 50 ("Or not"); *see also Rice v. Collins*, 546 U.S. 333, 340–41 (2006) ("[s]eizing on what can plausibly be viewed as an innocent transposition makes little headway toward the conclusion that the prosecutor's explanation was clearly not credible"). And it likewise dismissed Nibco's reliance on TG's previous jury experience on the basis of white jurors' previous jury experience only by omitting the fact that Nibco had noted specifically that TG had served on a *hung* jury. *Cf. United States v. Rudas*, 905 F.2d 38, 41 (2d Cir. 1990) ("service on a hung jury was legitimate reason for striking him"). The Ninth Circuit's "comparative" juror analysis thus compared apples

and oranges. Each of these missteps only reinforces the value and importance of deferring to the trier of fact, which is best-equipped to discern discriminatory intent and to evaluate the credibility of jurors and attorneys.

The Ninth Circuit's subversion of "clear error" review is further illustrated by its complete overlooking of respondents' failure to object before the district court to two of the four proffered race-neutral reasons for striking TG. As important as *Batson* is, it is not remotely jurisdictional and no more important than countless other constitutional protections that are routinely forfeited on appeal if not properly preserved at trial. *See United States v. Olano*, 507 U.S. 725, 731 (1993) ("'No procedural principle is more familiar to this Court than that a constitutional right ... may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it'") (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)).

It is therefore significant that respondents objected *only* to the relevance of the firing of TG's sister—on which the trial court did not rely—and the bias supposedly reflected in Nibco's phrasing of questions about TG's multi-lingual workplace. Respondents did not address TG's feelings about her multi-lingual workplace, her worker's compensation claim, or her service on a hung jury. *Cf. Rice*, 546 U.S. at 340–41 (criticizing Ninth Circuit panel majority for failing to consider "other permissible and plausible race-neutral reasons" for peremptory strike). By glossing over those failures to object, the Ninth Circuit contravened the well-established

principle that "failure to dispute an explanation to a *Batson* challenge results in waiver of that challenge." *Wright*, 536 F.3d at 438 (citing *Arce*, 997 F.2d at 1126–27); *see also Purkett*, 514 U.S. at 768 ("ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike"). That fundamental tenet of forfeiture "'discourages sandbagging and strategic behavior by trial counsel, and provides the prevailing party with notice.'" *Garraway v. Phillips*, 591 F.3d 72, 76 (2d Cir. 2010) (citation omitted).

C. The Issues At Stake Are Important And Recurring.

If left to stand, the decision below gives carte blanche to appellate courts to engage in *sua sponte* juror comparisons and unfettered second-guessing of trial court judgments of credibility, irrespective of the actual arguments and evidence presented to the trial court. The result here—rendering a 52-day jury for naught—dramatically illustrates the importance of the issues, but it is not an isolated case. *See, e.g.*, *Jackson v. Felkner*, No. 09-15379, 2010 WL 2933733, at *1 (9th Cir. July 23, 2010) (applying comparative juror analysis and, without any explanation, ordering habeas relief based on conclusion that prosecutor engaged in purposeful discrimination). The Ninth Circuit's improper approach upends basic principles of deference and forfeiture. It is inefficient and costly, enabling appellate courts to turn back the clock on expensive trials and lengthy jury deliberations based on little more than a "cold appellate record." *Snyder*, 552 U.S. at 483. And it opens the door to results-oriented appellate fact-finding that encourages

courts of appeals to superimpose their own prejudices in *de novo* assessments of the evidence.

Trial courts already struggle to balance the risk that jurors have been stricken for improper discriminatory reasons against the equally significant risk that *Batson* claims are raised to re-litigate claims where the outcome is not to a party's liking. The decision below tips that balance. In effectively compelling trial courts to engage in comparative juror analysis for each *Batson* challenge regardless of the parties' objections—or risk being reversed for failure to do so—the decision below imposes an unrealistic and unduly heavy burden on trial courts to waste resources investigating and ferreting out supposed discriminatory intent, even though the burden is supposed to be on the objecting party to prove purposeful discrimination.

This Court should grant plenary review to ensure that appellate courts review *Batson* findings with the requisite clarity and deference. Just as discriminatory jury selection may "undermine public confidence in the fairness of our system of justice," *Batson*, 476 U.S. at 88, aggressive reliance on *Batson* challenges to evade unfavorable jury verdicts after the fact subverts confidence in the rule of law.

II. If The Court Does Not Grant Plenary Review, It Should Summarily Reverse The Ninth Circuit's Decision To Vitiate A 52-Day Trial Without Remanding For Consideration Of The *Batson* Claim In The First Instance.

If it does not grant plenary review, the Court should summarily reverse. At a minimum, the Ninth Circuit's stunning decision to order a new trial—as opposed to remand—subverts fundamental principles of appellate review and procedural fairness. Having overseen a 52-day trial—approximately one fifth of the judge's work year—and personally overseen the voir dire, the trial court should have been given an opportunity to do its job and to consider the new arguments and evidence raised for the first time on appeal. This was not a habeas case; the trial judge who conducted voir dire was ready, willing, and uniquely able to consider the issues on remand. There is no doubt that in evaluating whether a party has purposefully discriminated, the trial court is in the best position to evaluate the credibility of counsel's reasons for exercising a preemptory strike. The Ninth Circuit's failure to provide the courtesy of a remand should not be allowed to stand.

The Ninth Circuit itself acknowledged that respondents "did not specifically point out below" the purported problems with Nibco's reasons for striking TG that, in its view, made the disposition of plaintiffs' *Batson* challenge clearly erroneous. App. 3. The Ninth Circuit further acknowledged that the comparative juror analysis on which it relied "was not requested or attempted below," and that it based

its assessment on its own independent "review of the juror questionnaires" included in the new appendix. App. 3–4. Given this, even assuming it were appropriate to consider new arguments and questionnaires relied on for the first time on appeal, and the court of appeals found colorable reasons to question the disposition of the arguments actually raised below, the Ninth Circuit should have remanded to afford the trial court an opportunity to weigh the new arguments and evidence and make the necessary credibility determinations.

As this Court has long recognized, an appellate court "is not the proper forum to air [an] issue in the first instance." *Christian Legal Soc'y Chapter of the Univ. of California v. Martinez*, 130 S. Ct. 2971, 2995 & n.28 (2010). "When the lower courts have failed to address an argument that deserved their attention, our usual practice is to remand for further consideration, not to seize the opportunity to decide the question ourselves." *Id.* The federal courts of appeals, like this Court, are courts of "review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005); *see also Martinez*, 130 S. Ct. at 2995 (court on remand "may consider CLS's pretext argument if, and to the extent, it is preserved"); *DeMarco v. United States*, 415 U.S. 449, 450 (1974) (court of appeals "should not have resolved in the first instance" a "factual dispute" not considered by the trial court); 5A J. Moore & J. Lucas, Moore's Federal Practice § 52.06 [2] (1982) (when a "trial court fails to make findings ... on a material issue ... the appellate court will normally vacate the judgment and remand").

The importance of a remand is especially pronounced given the fact-intensive nature of the *Batson* step-three inquiry. The "evaluation of [counsel's] state of mind based on demeanor and credibility lies peculiarly within a trial judge's province." *Hernandez*, 500 U.S. at 361, 364–65. As this Court has emphasized, race-neutral reasons for peremptory challenges often trigger "an evaluation of the prosecutor's credibility" or a "juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's first-hand observations of even greater importance." *Snyder*, 552 U.S. at 477; *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (credibility can be measured by "the prosecutor's demeanor"). Only the trial court has the first-hand understanding of the context in which the peremptory strikes were made, and the broadest appreciation of the totality of the circumstances. The trial judge here, for example, observed that he had been struck by RG's "very strange" and "very, very quiet" manner "in responding to my questions." EOR 254. Beyond noting that RG's mother, whom RG was close to, had experienced employment discrimination, the judge added that "in 17 and a half years as a trial judge, she is one of the oddest prospective jurors I've ever seen." *Id.* No cold record can provide comparable insights.

Courts of appeals thus consistently remand to allow trial courts to assess arguments and evidence related to *Batson* challenges in the first instance. *See, e.g.*, *Torres-Ramos*, 536 F.3d at 542 (remanding to the district court to evaluate *Batson* step three in light of juror questionnaires); *United States v. Taylor*, 509 F.3d 839, 851 (7th Cir. 2007) (remanding for trial court to articulate reasons for

credibility determination); *Rosales v. Dretke*, 444 F.3d 703, 710 (5th Cir. 2006) (vacating on *Batson* grounds and remanding "to the district court ... to consider additional arguments ... the district court did not reach"); *United States v. Hill*, 146 F.3d 337 (6th Cir. 1998) (same); *United States v. Joe*, 928 F.2d 99, 103–04 (4th Cir. 1991) (remanding where district court failed to make necessary Batson factual findings).

Courts impose the strong medicine of a new trial only in rare and exceptional circumstances where a remand would be futile. For example, courts have ordered a new trial where the district court has previously made clear that it is unwilling to carry out the appellate court's instructions, or where the judge that presided over the trial has died. *See, e.g., Riley v. Taylor*, 277 F.3d 261, 294 (3d Cir. 2001) (en banc) ("we see no reason to order the District Court to provide Riley with an evidentiary hearing that it declined to provide on two prior occasions"); *Barnes v. Anderson*, 202 F.3d 150, 157 (2d Cir. 1999) (ordering new trial because the trial judge had died). Here, the district court judge who presided over voir dire was available to consider issues never before raised in the district court. Under these circumstances, to wipe out a 52-day trial featuring more than 30 witnesses without a remand is unconscionable as a matter of sound judicial administration. Accordingly, even if this Court does not grant plenary review, it should summarily reverse with instructions to remand for further proceedings before the trial court.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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September 17, 2010

APPENDIX

TABLE OF APPENDICES

Appendix A

Opinion of the United States Court of Appeals for the Ninth Circuit, dated March 29, 2010 ..... App-1

Appendix B

Jury Selection Proceedings before the United States District Court for the Eastern District of California, dated October 8, 2008 ..... App-10

Nibco's Voir Dire App-10

Additional Voir Dire App-27

Batson Rulings App-53

Appendix C

Verdict in the United States District Court for the Eastern District of California App-60

Special Verdicts of Trial Jury, dated November 26, 2008 ..... App-60

Judgment, dated December 1, 2008 ..... App-66

Appendix D

Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing and Rehearing En Banc, dated May 20, 2010 ..... App-67

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 09-15136

MARTHA RIVERA, et al.,

Plaintiffs-Appellants,

v.

NIBCO, INC., an Indiana corporation,

Defendant-Appellee.

Argued and Submitted Feb. 23, 2010
Filed March 29, 2010

Before: REINHARDT, SILER,* and HAWKINS, *Circuit Judges*:

* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

MEMORANDUM

Appellants Rivera, et. al ("Rivera"), twenty-three Hispanic and Southeast Asian immigrant workers, brought suit against Nibco, their former employer, alleging that they had been terminated on the basis of their national origin in violation of Title VII of the Civil Rights Act of 1964. A jury returned a verdict in Nibco's favor. On appeal, Rivera contends that the

district court erroneously denied their *Batson* challenge to Nibco's use of three of its four peremptory strikes to remove Hispanic jurors. *See Batson v. Kentucky*, 476 U.S. 79 (1986). Because we conclude that, with respect to Juror "TG,"[1] the district court's denial of Rivera's *Batson* challenge was clearly erroneous, we reverse and remand for a new trial.[2]

I.

This appeal concerns *Batson*'s third step. At this step, the district court was obligated to "undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may [have] be[en] available" to determine whether Nibco's strikes were motivated by purposeful discrimination. *Batson*, 476 U.S. at 93 (internal quotation marks removed).

As an initial matter, we reject Nibco's argument that Rivera should be precluded on appeal from pointing out flaws in Nibco's proffered reasons that

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[1] In order to protect the potential jurors' privacy, we refer to them by their initials only.

[2] We also deny Nibco's Motion to Strike Appellant's Appendix, and grant Appellant's request to take judicial notice of the completed juror questionnaires. *See United States v. Torres-Ramos*, 536 F.3d 542, 560-61 (6th Cir. 2008) (taking judicial notice of juror questionnaires). We consider the questionnaires not for the truth of the potential jurors' statements, but as evidence of the information that was before Nibco when it made its peremptory strikes. *Cf. Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 960 (9th Cir. 2010) (taking judicial notice of magazine articles about paintings at issue in the case as evidence "of what information was in the public realm at the time").

are apparent from the record, but that Rivera did not specifically point out below. Rivera's initial *Batson* challenge "impose[d] on the trial court an obligation to complete the third step of the *Batson* process...." *United States v. Alanis*, 335 F.3d 965, 966 (9th Cir. 2003). "[T]he third step of *Batson* primarily involves the trier of fact," which "must evaluate the record and consider each explanation within the context of the trial as a whole...." *Kesser v. Cambra*, 465 F.3d 351, 359 (9th Cir. 2006) (en banc); *see also id.* ("[N]either the trial courts nor we are bound to accept at face value a list of neutral reasons that are either unsupported in the record or are refuted by it.") (internal quotation marks removed). Moreover, a comparative juror analysis is required on appeal, even when, as in this case, it was not requested or attempted below.[3] *Id.* at 361. We thus review the

[3] At oral argument, Nibco's counsel suggested in response to questioning by the court that a court's obligations in ruling on a Batson challenge might be different in civil and criminal cases. This Circuit has not previously recognized such a distinction. *See Montiel v. City of Los Angeles*, 2 F.3d 335 (9th Cir. 1993) (reversing and remanding for a new trial where district court in § 1983 action failed to conduct a proper Batson inquiry); *see also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (holding that the "same approach" to determining whether the proponent of a Batson motion has established a prima facie case of discrimination "applies in the civil context"); *but see Woodward v. Epps*, 580 F.3d 318, 337-38 (5th Cir. 2009) (distinguishing between courts' roles in ruling on a Batson motion in capital cases as compared to ordinary criminal or civil cases). Because Nibco did not raise this argument in the district court or in its brief on appeal, and because the parties both proceeded throughout this litigation on the basis that the rules and cases applicable to criminal proceedings applied here, we decline to consider the issue at this time.

district court's ruling in light of our review of the juror questionnaires.

II. Juror TG

Nibco gave five reasons for striking TG. The district court accepted three: (1) Her sister had problems with discrimination and had filed a discrimination claim (an assertion that Nibco's counsel had qualified by adding, "or not"); (2) She "loved" working with people who spoke different languages; and (3) She had filed a workers' compensation claim. The court did not address Nibco's other two proffered reasons: that TG's sister had been fired and that TG had previously served on a jury that failed to reach a verdict.

The record reveals major flaws in all three of the reasons accepted by the court. First, Nibco's assertion that TG's sister had experienced discrimination, which the district court converted into an assertion that TG's sister had brought a discrimination claim, was completely unfounded and has no support in the record. Second, TG never said she loved working in a multilingual environment. Nibco conflated two unrelated statements in asserting otherwise. Finally, a comparative juror analysis undermines Nibco's credibility regarding its concern with TG's workers' compensation claim: Four white jurors had also filed workers' compensation claims, and Nibco neither questioned them about their claims nor used its peremptory strikes to eliminate them from the jury. *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("If [a party's] proffered reason for striking a [Hispanic] panelist applies just as well to an otherwise-similar [non-Hispanic] who is permitted to serve, that is evidence

tending to prove purposeful discrimination to be considered at *Batson*'s third step.").

"The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that a court should sustain a *Batson* challenge." *Lewis v. Lewis*, 321 F.3d 824, 831 (9th Cir. 2003); *see also Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) ("[The] proffer of [a] pretextual explanation naturally gives rise to an inference of discriminatory intent."). Here, all of the reasons accepted by the district court either lack support in the record or are thoroughly undermined by a comparative juror analysis.

The remaining two reasons offered by Nibco, which the district court did not address—TG's jury experience and her sister's dismissal—are also seriously flawed. Three white jurors had previous jury experience, including one who said she had trouble "judging others," but Nibco did not find that to be a basis for striking, or even questioning them during voir dire. And it is implausible that TG would have been biased by her sister's dismissal: the record shows that TG believed that it was her sister's own fault, because she missed too much work.

Under these circumstances, and taking into account the fact that Nibco used its strikes disproportionately against Hispanic jurors in a case involving claims of national origin discrimination against Hispanic workers, *see United States v. Esparza-Gonzalez*, 422 F.3d 897, 905 (9th Cir. 2005) (stating that the racial element inherent in a trial is a fact "that should also be considered when evaluating whether the totality of the circumstances

gives rise to an inference of discriminatory intent"), the district court's conclusion that Nibco's proffered reasons were not pretexts for discrimination was clearly erroneous.

III. Juror "L"

"Because just one racial strike calls for a retrial," it is not necessary to determine whether there were genuine, non-racial reasons for striking the other two jurors. *Kesser*, 465 F.3d at 369. It is relevant, however, that Nibco's proffered reason for striking Juror L is highly questionable, "mak[ing] it even harder to believe that [its] reasons for striking [Juror TG] were race-neutral." *Id.*

Nibco's only proffered reason for striking Juror L was that he lived with his father who had been recently laid off due to a lack of work. Nibco's counsel stated that Juror L "indicated that ... the experience of his father getting laid off was something that bothered him and he was concerned about that." Counsel repeated three times that Juror L lived with his father and twice stressed that the lay-off was recent.

The record confirms that Juror L's father had been laid off. However, neither the court nor the parties asked him about the lay-off during voir dire (in fact, neither party asked him any questions at all), and there is no evidence in either the voir dire transcript or the juror questionnaires regarding how Juror L felt about it. Nor is there any evidence that the lay-off was recent, or that Juror L lived with his father. Nibco's lack of foundation for its assertions is troubling. Although on its own, it would not necessarily require a finding of intentional discrimination with respect to Juror L, it further

undermines Nibco's credibility with respect to its reasons for striking Juror TG.[4]

IV.

Nibco's stated reasons for striking juror TG were implausible, unsupported by the record, and/or undermined by a comparative juror analysis. Accordingly, the district court erred in finding that they were not pretext for intentional discrimination. We therefore REVERSE and REMAND for a new trial.

REVERSED and REMANDED.

SILER, Circuit Judge, dissenting:

I respectfully dissent from the majority. Even though the procedure in a *Batson* challenge seems to be a pitfall for the district courts, *Kesser v. Cambra*, 465 F.3d 351, 359 (9th Cir. 2006) (en banc), requires the district court to consider each explanation within the context of the record, regardless of whether relevant portions of the record are brought to its attention by the movant. Therefore, in light of

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[4] Nibco's proffered reason for striking the third Hispanic potential juror, RG, was similarly problematic. Nibco asserted that RG's mother had been involved in a discrimination suit against her former employer. However, the record reveals that RG's mother had experienced discrimination at work and then "just moved on." As with Juror L, this inconsistency may not so undermine Nibco's credibility with respect to its reasons for striking Juror RG that it compels a finding of intentional discrimination with respect to her, but it provides further evidence of intentional discrimination with respect to Juror TG. *See Kesser*, 465 F.3d at 368-69.

Kesser, I concur with the majority in its denial of the motion by Nibco to strike appellants' appendix and its granting the request to take judicial notice of the completed juror questionnaires as tendered by the appellants.

I part company with the majority with regard to its determination that the district court clearly erred in finding that the stated reasons by Nibco for striking Juror TG were not a pretext for intentional discrimination. As the majority states, the district court accepted three reasons for striking TG and did not address the two other reasons. Although Nibco's counsel made a mistake when he claimed that TG's sister had problems with discrimination, counsel apparently corrected the mistake when he said "or not." The sister had not indicated any problems with discrimination, but she had been fired for calling in to be excused too many times. TG said it was her sister's own fault that she was fired, but that does not show discrimination. Counsel also said that TG "loved working" with people who spoke different languages. TG did say that she worked in a diverse workplace for Frito Lay and that she got along with everyone. She also said that Frito Lay was a great company to work for and that she had no grievances with it. The suggestion that she loved working in a diverse workplace was probably a subjective thought by counsel. She also had filed a workers' compensation claim, as did some of the non-Hispanic jurors. Although four non-Hispanic jurors also filed workers' compensation claims, they did not have the overall mixture of criteria related by Nibco. Consequently, the majority's comparative juror analysis is an exercise in comparing apples to oranges.

Finally, Nibco indicated that TG had previously served on a jury that failed to reach a verdict. Although comparing just one of these criteria with the criteria found in a non-Hispanic juror questionnaire might lend credence to a determination that there was discrimination, when all of these factors were related about TG, the district court did not clearly err in finding a non-discriminatory motive in striking TG. Evaluating the state of mind of Nibco's counsel, based on demeanor and credibility, "lies peculiarly within a trial judge's province." *See Hernandez v. New York*, 500 U.S. 352, 365 (1991). Thus, the district court's determination of no discriminatory animus is entitled to more deference than was allowed by the majority.

Because the majority does not indicate that the district court clearly erred in finding no discrimination in the striking of Juror L or RG, I do not discuss those jurors nor the criteria used in striking them. For the reasons stated heretofore, I would find that the district court did not clearly err in finding no discriminatory intent in striking certain jurors. I would affirm the district court.

Appendix B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

HON. OLIVER W. WANGER, JUDGE

MARTHA RIVERA, et al.,	)	
Plaintiff,	)	No. 99-CV-6443-OWW
vs.	)	JURY TRIAL - DAY 1
NIBCO, INC., an Indiana corporation,	)	JURY SELECTION
Defendant.	)	
	)	

Fresno, California Wednesday, October 8, 2008

REPORTER'S TRANSCRIPT OF PROCEEDINGS

KAREN LOPEZ, RMR-CRR
Official Court Reporter
CSR No. 5816

* * *

MR. HAHESY: Good afternoon, ladies and gentlemen.

I'm going to start off by asking a few questions that are general to all of you. And then I have a few that I'd like to ask you individually.

Kind of want to follow up on a comment you made, Mr. Nunez, about a doctor's note for damages. If you were trying to decide whether to award damages for emotional distress and all you had was the person's word, there was no medical evidence, nothing else,

just their word, would that -- would you have a hard time in that situation giving an award of emotional distress?

PROSPECTIVE JUROR NUMBER NINETEEN: It would be like the judge said, follow the law.

MR. HAHESY: So you'd be able to follow the law?

PROSPECTIVE JUROR NUMBER NINETEEN: Yes, sir.

MR. HAHESY: And how about you, Mr. Stanford, you had an opinion on that earlier about if it came down to needing some more evidence, would you need more than someone's word about whether they suffered stress or not before you'd be willing to give them damages?

PROSPECTIVE JUROR NUMBER EIGHT: I don't think that was me, but I'll tell you my answer is I think I'd just follow the law. I'd have to. I'm required by law to follow the law.

MR. HAHESY: So all of you --

PROSPECTIVE JUROR NUMBER EIGHT: That's what I'm here for.

MR. HAHESY: -- would be willing to follow the law, whatever it was, and both the plaintiffs and the defendant would be on the same footing in terms of your decision, is that right?

Now, Mr. Brooks, you were asked a few questions by Mr. Smith about language issues. And in the workplace that you're in now, what are the languages that are spoken?

PROSPECTIVE JUROR NUMBER THREE: English and Spanish.

MR. HAHESY: And Mr. Stanford, you mentioned, you know, you're in the electrical field.

PROSPECTIVE JUROR NUMBER EIGHT: Yes, sir.

MR. HAHESY: And what languages are in your workplace that you --

PROSPECTIVE JUROR NUMBER EIGHT: Our official job description says must read, write and speak English.

MR. HAHESY: Mr. Smith's questions to you mainly focusing on Spanish and English. Have any of you ever worked in a workplace where there may be five or six different languages spoken? Mr. Paul.

PROSPECTIVE JUROR NUMBER ONE: Yes. I was active duty Navy, so there was a whole pot full of different languages that were speaking. But it was always the primary, they of course needed to know English.

MR. HAHESY: So in the military, your military experience, people would be able to speak their own language, but they had a requirement that they had to be able to speak basic English.

PROSPECTIVE JUROR NUMBER ONE: Right. Speaking the other language would be on their own, talking to their friends or, you know, in that capacity. But at work, they had to speak English.

MR. HAHESY: Ms. Hyer, did you raise your hand?

PROSPECTIVE JUROR NUMBER ELEVEN: Yeah, basically being a bank teller, you confront people that speak every type of language coming in and they want to either cash their check or deposit or whatever. So you're talking everything from Russian to Hmong to German to Spanish. And

English. And it is difficult. And sometimes you really don't know what they want to do. Do they have an account? Do they not have an account? You know, they say cash. No, they wanted a deposit. So it's -- yeah, you meet all kinds.

MR. HAHESY: Anybody else have any -- Ms. Lucas.

PROSPECTIVE JUROR NUMBER NINE: I was a flight attendant for Untied Airlines so our main focus was English. But we had others who spoke other languages who translated on the aircraft. But we had to read and write English.

MR. HAHESY: And Mr. Veldstra, did you --

PROSPECTIVE JUROR NUMBER SEVEN: Yes. Obviously being a police officer, we dealt with people from all over the world. And a lot of times they didn't speak English and you improvised.

MR. HAHESY: And can you -- how were your experiences with the improvising?

PROSPECTIVE JUROR NUMBER SEVEN: Well, a lot of times less than satisfactory. But you do what you need to do to adapt and overcome.

MR. HAHESY: Anybody else have any? A number of you on the questionnaire mentioned that sometime or another through your time at work, you'd gone through safety training. Anybody here, the last couple of years, gone through safety training at work. Mr. Dias?

PROSPECTIVE JUROR NUMBER FIFTEEN: We have personnel meetings on how to run the equipment proper and what to -- proper equipment, what to do out in the field to be safe.

MR. HAHESY: Did -- in your job, do you get safety training more often than, you know, once a year?

PROSPECTIVE JUROR NUMBER FIFTEEN: No.

MR. HAHESY: How about Mr. Mello, did you -- you get safety training at Turlock Irrigation District?

PROSPECTIVE JUROR NUMBER SIXTEEN: Yeah. We have an overall -- at least once a year an overall class and then every ten days I'm retried to give a tailgate meeting to my crew on whatever I decide, you know, depending on what job we're doing at that time.

MR. HAHESY: And you mentioned, I think, do you have people that you work with that speak Spanish?

PROSPECTIVE JUROR NUMBER SIXTEEN: No. My crew is mainly English speaking.

MR. HAHESY: So you're weekly -- or your every ten day training you do in English.

PROSPECTIVE JUROR NUMBER SIXTEEN: Yes.

MR. HAHESY: Anybody else have any recent experience -- Mr. Stanford.

PROSPECTIVE JUROR NUMBER EIGHT: We have routine recurring safety training, everything from CPR, first aid to electrical maintenance to every two weeks we have a briefing within our department of what's going on in all the different monitoring stations and all the accountings in San Joaquin Valley. And everything from office ergonomics to everything. Just pretty general.

MR. HAHESY: Some of that training that you've gone through and sometime does your employer pass out a quiz or test for you --

PROSPECTIVE JUROR NUMBER EIGHT: Oh, yes, sir.

MR. HAHESY: -- to take.

PROSPECTIVE JUROR NUMBER EIGHT: Just about every time.

MR. HAHESY: Anybody else have that same experience. Ms. Tweedy.

PROSPECTIVE JUROR NUMBER THIRTEEN: Being a teacher, we go through like sexual harassment, child abuse, CPR stuff, it's all done on the internet and we do it once a year.

MR. HAHESY: So you access the computer and take the training.

PROSPECTIVE JUROR NUMBER THIRTEEN: Uh-huh.

MR. HAHESY: Do you have to answer some questions throughout the course of the training?

PROSPECTIVE JUROR NUMBER THIRTEEN: Yeah, you have like 20 questions at the end and you have to pass it with 100 percent or retake it.

THE COURT: Mr. Brooks, you had your hand up?

PROSPECTIVE JUROR NUMBER THREE: Yeah, for our men we do tailgate meetings also with our safety manager. Like GAPs, General Agricultural Practices, fruit safety reasons and certain things like that. And she asked questions at the end and whoever gets the answers, they give them something or whatever like that. And then for the managers, we have yearly sexual harassment and CPR trainings.

MR. HAHESY: Do you have an understanding, Mr. Stanford, why you're given the quizzes at the end of the trainings?

PROSPECTIVE JUROR NUMBER EIGHT: Yes, sir.

MR. HAHESY: What's your understanding?

PROSPECTIVE JUROR NUMBER EIGHT: It's to enhance your ability to learn what they're teaching. Military taught me that many, many years ago.

MR. HAHESY: Anybody else have any experience with safety training or -- Ms. Keegan.

PROSPECTIVE JUROR NUMBER FOUR: Yes. We have safety training at each of our stores. About once a year usually. And it involves having the quiz afterward. Go over different things at different times.

MR. HAHESY. Now, you work -- you own auto parts store?

PROSPECTIVE JUROR NUMBER FOUR: Right.

MR. HAHESY: Does it also do mechanical work?

PROSPECTIVE JUROR NUMBER FOUR: No.

MR. HAHESY: So you sell auto parts and things of that nature?

PROSPECTIVE JUROR NUMBER FOUR: Right.

MR. HAHESY: So annually, your company has experience with giving safety training followed by a quiz of some type.

PROSPECTIVE JUROR NUMBER FOUR: Right.

MR. HAHESY: Anybody else? Ms. Garza.

PROSPECTIVE JUROR NUMBER TWENTY: Yes. We have safety training daily at our work actually. Every shift that comes on, they talk about the safety there to, you know, always be safe and everything. And then once a month they do a test. And that's for our records, for our auditors to see, review, to have that we are training our employees out there.

MR. HAHESY: Besides safety training, is there other types of training that you folks go through at times with your employers or handle with your employees? Mr. Paul.

PROSPECTIVE JUROR NUMBER ONE: We go through has mat, we go through safety and we go through sexual harassment, sensibility, diversity, all that training. The diversity sexual harassment, as a requirement every year, the has mat and the other safety training that we go through, we do it weekly.

MR. HAHESY: How about Mr. Stanford?

PROSPECTIVE JUROR NUMBER EIGHT: Had several courses from California Highway Patrol on defensive driving. Also had extensive sexual harassment both in the military and civilian repeatedly annually. And some sensitivity training.

MR. HAHESY: Anybody else?

The -- just have a few questions for a few of you individually, just to follow up on some of the questions that Your Honor asked.

MS. BRANNUM. On the questionnaire, one of the questions was asked about your views about whether English should be spoken in the workplace. And you didn't comment on that. I just -- I don't know if you have a comment on that or it just was overlooked

when you were filling out the questionnaire. Do you remember that question?

PROSPECTIVE JUROR NUMBER TWO: Yeah.

MR. HAHESY: Do you have any view about whether English should be spoken in the workplace?

PROSPECTIVE JUROR NUMBER TWO: I don't really have one.

MR. HAHESY: Ms. Garcia, just trying to follow up on a couple of things. And I want to preface this by saying I'm not intending to pry. Okay? Because I know that these questionnaires ask some questions that, you know, people, you know a lot of times doesn't want to go into. And so I'm going to ask at a very general level, but I do need to do it, you know, for purposes of getting the information. You mentioned on your questionnaire that I believe you had experience with either you or someone close to you had been subjected to discrimination or harassment.

PROSPECTIVE JUROR NUMBER SEVENTEEN: Yes.

MR. HAHESY: Is that you or somebody close to you?

PROSPECTIVE JUROR NUMBER SEVENTEEN: My mother.

MR. HAHESY: And can you tell me about how long ago that was?

PROSPECTIVE JUROR NUMBER SEVENTEEN: It would be three, four years ago, but it lasted for a while.

MR. HAHESY: And without getting into a lot of detail, I mean, what -- where did your mother work at that time?

PROSPECTIVE JUROR NUMBER SEVENTEEN: She's a secretary for a -- like a rental management company.

MR. HAHESY: And just in general, what was -- what was she experiencing?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Discrimination by her boss. Racial.

MR. HAHESY: And were you -- did your mother share this information with you as she was kind of going through this?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Yes.

MR. HAHESY: Did your mother end up filing any kind of claim or lawsuit?

PROSPECTIVE JUROR NUMBER SEVENTEEN: No, she just moved on.

MR. HAHESY: And did she -- can you tell us just in general what the discrimination was? I don't want -- I'm not prying, I don't want a lot of detail, just get a little more.

PROSPECTIVE JUROR NUMBER SEVENTEEN: Just a preference. It was made clear preference between one race over another as far as pay and other stuff.

MR. HAHESY: And the races that were involved was which ones?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Mexican and white.

MR. HAHESY: And I take it your mother resolved it by -- by leaving the job; is that what you mentioned?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Uh-huh.

MR. HAHESY: I couldn't --

PROSPECTIVE JUROR NUMBER SEVENTEEN: Yes.

MR. HAHESY: Now, you also mentioned that you had -- you or someone close to you had witnessed discrimination or retaliation and harassment at work. Is that -- is this the same instance or is it the different instance?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Yes, the same.

MR. HAHESY: So these questions that we were asking on the questionnaire about have you or anyone close to you been subjected to these things, that related to your mother?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Yes.

MR. HAHESY: Now, you -- one of the questions that you were asked was also about the requirement of speaking English in the workplace. Do you have a view on that?

PROSPECTIVE JUROR NUMBER SEVENTEEN: I can see the point where, you know, to get across everything, okay. But I work with a lot of Spanish speaking and we get along -- you know, we get our word across fine and I am not fluent in Spanish. But we make our points clear and work side by side.

MR. HAHESY: Do you have some fluency in Spanish?

PROSPECTIVE JUROR NUMBER SEVENTEEN: I'm not fluent, no.

MR. HAHESY: All right. Mr. Nunez, that same question was asked of you about your view about whether English should be spoken in the workplace. And I know when you fill these out sometimes they get overlooked or sometimes people just don't want to give a response. Do you have a view?

PROSPECTIVE JUROR NUMBER NINETEEN: I keep it to myself.

MR. HAHESY: All right. The -- when you worked for the -- you were in the military.

PROSPECTIVE JUROR NUMBER NINETEEN: Yes, sir.

MR. HAHESY: And did the military have some requirements when you were there about being able to speak certain --

PROSPECTIVE JUROR NUMBER NINETEEN: The Puerto Rican.

MR. HAHESY: Pardon?

PROSPECTIVE JUROR NUMBER NINETEEN: Most of the guys I worked with was Puerto Rican.

MR. HAHESY: You were stationed in Puerto Rico.

PROSPECTIVE JUROR NUMBER NINETEEN: No. Most of the guys I was with were Puerto Ricans, from New York. And more than Spanish. Spanish is a different language. Puerto Ricans speak it. Cubans speak it. So Spanish is all races. Italian, French, same, similar sound

MR. HAHESY: So when you were in the military, kind of like Mr. Hall mentioned.

PROSPECTIVE JUROR NUMBER NINETEEN: Yeah.

MR. HAHESY: A lot of different languages, but --

PROSPECTIVE JUROR NUMBER NINETEEN: Yeah.

MR. HAHESY: -- when they were at work, people had to speak English.

PROSPECTIVE JUROR NUMBER NINETEEN: It didn't matter to me as long as you get the job done.

MR. HAHESY: Ms. Garcia, just a couple more. Are you -- are you close to your mother?

PROSPECTIVE JUROR NUMBER SEVENTEEN. Yes.

MR. HAHESY: I mean, do you see her quite often?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Uh-huh. Yes.

MR. HAHESY: You know, have you -- have you talked to her a lot about the experience she had at the work?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Yeah. During the time when it was happening more so than now.

MR. HAHESY: Now, this case involves -- there's 23 women. And would you -- would it be hard for you to put aside your mother's experiences in deciding a case that involved 23 women?

PROSPECTIVE JUROR NUMBER SEVENTEEN: I would have to hear what they would have to say.

What's being presented, you know. There's true, false.

MR. HAHESY: Does anybody -- just because there are 23 plaintiffs, does anybody think that there must be, you know, something to the numbers? I mean, is anybody going to give more credence to one side of the case because there's more people suing than just one person? Anybody?

Regardless of the fact that there's 23 plaintiffs; can everybody assure me that they'll give both sides fair consideration regardless of how many people are bringing the claims?

All right. Thank you.

THE COURT: All right. That completes the voir dire, members of the jury. We're now going to engage in the actual jury selection. If you want to stand up and stretch, you can do that. This will take a few minutes.

(Passing the strike sheet.)

THE COURT: Mr. Hahesy, would you approach, please?

(The following proceedings were held at sidebar between the Court and counsel:)

THE COURT: All right. Mr. Smith.

MR. SMITH: Yes, Your Honor. We would like to raise an issue for cause dismissal of two jurors. Number three, Mr. Brooks, who stated that he could not -- he did not believe that an employer should have to pay anything in damages if they fired someone. That they should be able to fire or layoff anyone without paying damages with the quote we

got from him. So I would like to move to dismiss him for cause.

And Mr. Douglas, who has testified or stated under oath that he would require a doctor's report before he would agree to give anybody emotional distress damages. So those are the two people we think should be dismissed for cause.

THE COURT: Mr. Hahesy.

MR. HAHESY: I disagree. Both of them were later asked would they decide the case based upon the evidence and would they follow the law. Your Honor asked all of them that. And they all indicated they would follow the instructions that were given to them by the Court.

MR. SMITH: Your Honor, may I --

MR. HAHESY: I think they're all basically saying that whatever the evidence is consistent with the law, that's what they'll follow.

MR. SMITH: Counsel did not even ask Mr. Brooks a question about his comment that he believed that an employer should get a free pass laying off someone without having to pay any damages. So he did not rehabilitate him on that issue and didn't ask any questions that were remotely addressed that issue.

And he asked a broad question, not a question specifically to Mr. Douglas, can you all be fair? Can you all follow the law? Well, that doesn't rehabilitate someone who says that he requires a medical doctor's report in order to give emotional distress damages. He did not address that issue directly either, Your Honor. And so we believe there is sufficient basis for cause of dismissal both of those jurors.

THE COURT: All right. Is the matter submitted?

MR. HAHESY: Yes.

MR. SMITH: Yes, Your Honor.

THE COURT: Taking up the matter of Mr. Brooks. Mr. Brooks said that an employer should have the right to get rid of an employee without paying money. And in the context of his statement, it was unclear because it wasn't followed up, whether or not that was for cause termination or a not a form cause termination.

He also, in effect, said that -- and the Court is using my words, not his, because I don't have the transcript in front of me, but it was my sense that he said words to the effect that business is economics and the employer ought to be able to do what is economically in the employer's interest, including terminating people without have to compensate them. And nobody asked him, when you came back, you didn't ask him, well, whether if that were against the law -- I asked the question about violating the law, but I didn't hear his specific answer.

And so I think that the challenge to Mr. Brooks is well taken. Candidly, I had written down for cause myself when I heard his answers. And so I am going to excuse Mr. Brooks for cause.

As to Mr. Douglas, although he definitely said that he would want to have a doctor's proof, he indicated that he would listen to all the evidence and that he would follow the law. And if he is instructed, as a matter of law, that there is no requirement of a doctor's evidence, that was what you didn't include in your question. You didn't say, well, now, after he

said his statement, if you were told that the law doesn't require a doctor's evidence, would you still require it? That would be the cause that he wouldn't follow the law. But I didn't hear him go to that extent.

MR. SMITH: I thought I did ask that, Your Honor. I thought I did specifically ask the question about if you were instructed that that is not a requirement, could you do it? And he still persisted in his no. Maybe I'm incorrect in my recollection.

THE COURT: I heard you ask that question, I'm just not sure if he answered it. Let's see if we can look at that portion of his answer.

(Off the record.)

THE COURT: What we can do is this. I have no problem asking these questions now specifically of Mr. Douglas. We might as well get to the bottom of it now.

MR. HAHESY: Can we ask it of Brooks then?

THE COURT: Sure.

MR. HAHESY: I would like to have it to Brooks before we grant --

MR. SMITH: Well --

MR. HAHESY: I mean --

MR. SMITH: So they want another shot at rehabilitating him after the Court's ruling.

MR. HAHESY: That's the same way with Douglas. I mean, Brooks is the same thing.

MR. SMITH: I don't think so.

THE COURT: I will say this. On Brooks. I wrote "for cause" in my notes.

MR. HAHESY: I know, but he was asked questions before. "Can you be fair? Can you follow the law?"

THE COURT: No, I understand that.

MR. SMITH: Counsel didn't follow up, Your Honor.

MR. HAHESY: Well, you didn't follow up with Douglas.

MR. SMITH: That's a big difference.

THE COURT: All right. Well, if I'm going to be equitable here, although I will have to hear something to change my mind, let me do the questioning. I'll let you follow up if you need to. And we'll see where we are.

(The following proceedings were held in open court:)

THE COURT: Ladies and gentlemen, I want to follow up on questions that the attorneys asked so that we can have a clear understanding of what prospective jurors have intended by their answers. Because it's my duty to make sure that each prospective juror is willing to follow the law. And so if I could, Mr. Brooks, let me ask you about your views.

As I understood your answers, you had said essentially that as a business owner and operator, that you feel it's your right to run a profitable business. If you have to terminate somebody, you want to be able to terminate them and not have to pay damages for that.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: That's the general principle. Now, let's assume that in doing this termination, you do it for a reason that the law says you can't do it for. Even if you think that it's right, the law prohibits it, do you still think, even if the law says that that's not a valid reason, that's not a cause that you can terminate an employee for, that you should not have to be accountable for that if you break the law in terminating an employee?

PROSPECTIVE JUROR NUMBER THREE: Within certain situations, but sometimes -- truthfully, I feel that a lot of times law steps in certain areas that they shouldn't.

THE COURT: All right. And I respect that. Completely. And you're entitled to have your views. But if it is your belief that essentially you should be able to run your business the way you want to without the law interfering, I don't have any criticism of you for having that view, but if that's not the law, then in effect what you're telling us is that you wouldn't follow the law in this case. Do you understand what I'm saying?

PROSPECTIVE JUROR NUMBER THREE: Yeah, I think so.

THE COURT: And is that the way it is?

PROSPECTIVE JUROR NUMBER THREE: Yeah.

THE COURT: All right. Well then we're going to thank and excuse you. And again, we appreciate -- there are no rights and wrongs here, but we appreciate -- there are no rights and wrongs here, but we appreciate your honesty because we've got to be assured that every juror will follow the law.

PROSPECTIVE JUROR NUMBER THREE: Okay.

THE COURT: So call the number after five on Friday, please.

Now, Mr. Douglas, I want to come back to you on this issue of the damages. You mentioned that you would want to see objective proof of emotional distress. And let me indicate to you generally, I'm not giving you exhaustive definition of the law. If an instruction is given at the end of the case that if somebody's rights are violated, if the law is broken, then one of the things that you may consider is the extent to which there has been mental anguish, mental pain, suffering, humiliation or embarrassment, caused to somebody by an unlawful act, and that you said you would require a doctor's excuse or some kind of objective documentation of that.

First of all, understanding what I've just defined the concept of emotional distress damages as, would you be willing to consider such a claim for that defined type of damage or do you just not believe in that?

PROSPECTIVE JUROR NUMBER SIX: I just have a hard time believing, Your Honor, that somebody can come in here and say, "well, I'm suffering emotional distress." Well, am I supposed to believe what they say? Just because they said it.

THE COURT: Absolutely not. If somebody said I didn't sleep for 20 nights after the event, I lost 14 pounds, I was mad at my children all the time and other matters, that would be evidence that you would consider. If you wouldn't be willing to consider it, then --

PROSPECTIVE JUROR NUMBER SIX: I think they should have took a sleeping pill.

THE COURT: All right. My sense is, from your answer, that it would probably be better for us to get a different case for you to serve on. So we're going to thank and excuse you. And if you would, call the number after five on Friday, Mr. Douglas.

PROSPECTIVE JUROR NUMBER SIX: Thank you.

THE COURT: All right. I'm going to ask that the courtroom deputy fill those two seats.

THE CLERK: John Wenzel.

THE COURT: This is not a race to the seat. We'll ask Mr. --

A PROSPECTIVE JUROR: Would you restate the name, please.

THE CLERK: John Wenzel, W-E-N-Z-E-L.

THE COURT: All right. Mr. Wenzel, if you would take the first seat that was vacated. That's the number three seat up there.

THE CLERK: Justin Gentry.

THE COURT: Good afternoon, Mr. Wenzel.

PROSPECTIVE JUROR NUMBER THREE: Good afternoon, Your Honor.

THE COURT: Do you know anything about the case or anybody associated with it?

PROSPECTIVE JUROR NUMBER THREE: No, I don't.

THE COURT: Any issues raised for you in my questions?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: Can you give us your background, please?

PROSPECTIVE JUROR NUMBER THREE: I worked for Yosemite Concession Services for 30 years. I'm retired. My wife and I have lived in Mariposa for 27 years. She works at Mariposa Unified School District as the secretary.

THE COURT: Your education?

PROSPECTIVE JUROR NUMBER THREE: High school.

THE COURT: Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER THREE: Yes. I served on the grand jury I think it was about 1993.

THE COURT: In Mariposa County?

PROSPECTIVE JUROR NUMBER THREE: In Mariposa County, yes.

THE COURT: How about on any other jury?

PROSPECTIVE JUROR NUMBER THREE: I vaguely recollect one about 35 years ago. It was criminal.

THE COURT: All right. Was there a verdict?

PROSPECTIVE JUROR NUMBER THREE: Yes. Real fast.

THE COURT: Now, putting aside your jury service, other court experiences?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: How about disputes. Claims being made against you. You making claims. Any kind of business kinds of disputes?

PROSPECTIVE JUROR NUMBER THREE: Other than family matters, no.

THE COURT: All right. Anything about those matters that could affect this case?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: Totally separate.

PROSPECTIVE JUROR NUMBER THREE: Yeah.

THE COURT: Now, how about issues in the workplace? Were there any disputes? Union problems? Any kinds of issues, people claiming their rights were violated by their employer?

PROSPECTIVE JUROR NUMBER THREE: The usual, but they just seem to fade away.

THE COURT: All right. Were you ever in a position where you felt that your rights were being violated?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: You never made any claims?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: Did anybody in the workplace ever complain about you?

PROSPECTIVE JUROR NUMBER THREE: No. Not to my knowledge.

THE COURT: All right. Now you've heard what this case is about.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: Could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER THREE: I could, yes.

THE COURT: We've discussed this matter of the types of damages that are being sought. Would you consider damage claims?

PROSPECTIVE JUROR NUMBER THREE: If they're reasonable, yeas.

THE COURT: All right. And as to what evidence the law says would or would not be admissible for you to consider, as to whether damages were proved, would you be willing to follow the law?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: And when you say "reasonable," tell us what you mean by that?

PROSPECTIVE JUROR NUMBER THREE: Well, not outlandish claims. There are instances where people, you know, they fake things. They go into court and think that they can sue for everything under the sun. That's why we have doctors that can't go into private practice. They have to go into groups because of the high price of malpractice insurance.

THE COURT: All right. You're saying that you would want to have relationship between the harm that is claimed and the nature of the injury?

PROSPECTIVE JUROR NUMBER THREE: Yes, definitely.

THE COURT: You've been listening to the views of other jurors being expressed here in response to questions.

PROSPECTIVE JUROR NUMBER THREE: Yes, I have, sir.

THE COURT: Was there anything that caught your attention that you would want to tell us about that was significant to you?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: Do you feel you could be fair and impartial in hearing this kind of a case?

PROSPECTIVE JUROR NUMBER THREE: I feel I could, yes.

THE COURT: Is there any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER THREE: Yes. I've had two back surgeries, one July 15th, and because of it, I have nerve compression where my legs are continuously asleep. And driving down today from Mariposa, I had to get out and walk around the car several times to wake up --

THE COURT: It's a physical matter.

PROSPECTIVE JUROR NUMBER THREE: yeah.

THE COURT: All right. We'll thank and excuse you from this case then, Mr. Wenzel. Please call the number after five on Friday.

PROSPECTIVE JUROR NUMBER THREE: Okay. Thank you. Have a good day.

THE COURT: What's left of it.

PROSPECTIVE JUROR NUMBER THREE: What's left.

THE CLERK: Denise Langley.

THE COURT: Good afternoon, Ms. Langley.

PROSPECTIVE JUROR NUMBER THREE: Good afternoon.

THE COURT: Do you know anything about the case or anybody associated with it?

PROSPECTIVE JUROR NUMBER THREE: No, I don't.

THE COURT: Have any of questions raised issues for you?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: Can you give us your background, please?

PROSPECTIVE JUROR NUMBER THREE: I live in Calaveras County. I've lived there for eight years, although I was born and raised, I left and came back. I'm a financial analyst for a hospital. I have a significant other who I lived with for the time I moved back to San Andreas. He owns a grocery store.

THE COURT: Your education?

PROSPECTIVE JUROR NUMBER THREE: College.

THE COURT: Ever serve on a jury?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: Civil or criminal?

PROSPECTIVE JUROR NUMBER THREE: All criminal.

THE COURT: More than one?

PROSPECTIVE JUROR NUMBER THREE: Three times.

THE COURT: Three times. Did all three cases reach verdicts?

PROSPECTIVE JUROR NUMBER THREE: I believe the one, the first one in LA was settled before we got --

THE COURT: Before you deliberated?

PROSPECTIVE JUROR NUMBER THREE: Right.

THE COURT: So there were two verdicts?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: Thank you. How about other experience with courts, putting aside jury service?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: All right. Have you always been a financial analyst or have you had other kinds of work?

PROSPECTIVE JUROR NUMBER THREE: Union issues. I've been through several -- not me personally, but I've -- we went through a layoff at the hospital several years ago.

THE COURT: Was it like a reduction in staff?

PROSPECTIVE JUROR NUMBER THREE: Reduction in the work force, yes.

THE COURT: Yes. All right. Did that produce some dislocation?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: And hard feelings?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: On the part of those who were laid off.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: All right. But you were not one who was laid off.

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: Did any of that spill over on to you?

PROSPECTIVE JUROR NUMBER THREE: No, not really.

THE COURT: Were you in management then?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: And did you have any role in the layoff decisions?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: And what role did you have?

PROSPECTIVE JUROR NUMBER THREE: I was pulled into several meetings to -- I work a lot with the productivity for different departments in the hospital. And so I was asked could we cut the number of employees in this department. That sort of thing.

THE COURT: Was yours more a financial analysis than a qualitative work productivity analysis?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: Were you in the position of evaluating the individual performance of employees?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: No. Somebody else did that.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: Did you essentially say, well, we ought to be able to do this job with four instead of six people?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: All right. But somebody else made the decision upon who would go.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: And the merits of those people, whether to retain or to --

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: -- not retain.

All right. Other issues besides that, that you've experienced?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: None?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: All right. You've heard about the nature of the claims here. Do you have any hesitation in being fair and impartial?

PROSPECTIVE JUROR NUMBER THREE: I would do my best to be fair and impartial.

THE COURT: Good. And as to damage claims, do you have any views against damages, would you be willing to consider claims for damages?

PROSPECTIVE JUROR NUMBER THREE: As long as they were reasonable.

THE COURT: All right. And in terms of defining reasonable, how do you approach that?

PROSPECTIVE JUROR NUMBER THREE: I think -- I think if someone has been dealt a bad hand, then, you know, I think the amounts need to be reasonable for what they've been dealt.

THE COURT: All right. And you'd do that based on the evidence in the case?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: And your good common sense and judgment.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: All right. do you believe you could e fair ana impartial overall in the case?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: Any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: Thank you very much.

Now we're going to ask Mr. Gentry. Do you know anything about the case or anybody associated with it?

PROSPECTIVE JUROR NUMBER SIX: Nothing

THE COURT: Have you heard all the questions?

PROSPECTIVE JUROR NUMBER SIX: Yeah.

THE COURT: Any issues raised?

PROSPECTIVE JUROR NUMBER SIX: I kind of find it hard to believe that they're suing over being discriminated against, but they got hired to begin with. I just feel like it's -- it's nothing to be honest.

THE COURT: All right. And so the plaintiffs start behind for you.

PROSPECTIVE JUROR NUMBER SIX: Yeah.

THE COURT: All right. Well, let's get a different case for you to serve on. If you would call the number after five on Friday, please.

PROSPECTIVE JUROR NUMBER SIX: Cool.

THE COURT: We'll excuse you. Than you, Mr. Gentry.

THE CLERK: Teresa Gomez.

THE COURT: Good afternoon, Ms. Gomez

PROSPECTIVE JUROR NUMBER SIX: Good afternoon.

THE COURT: Do you know anything about the case --

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: -- or anybody associated with it?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: Have any issues been raised for your by anybody's questions?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: Can you give us your background, please?

PROSPECTIVE JUROR NUMBER SIX: I live in Bakersfield. I've lived there for 18 years. I'm a school bus driver.

THE COURT: Education?

PROSPECTIVE JUROR NUMBER SIX: High school.

THE COURT: Do you have a spouse?

PROSPECTIVE JUROR NUMBER SIX: 27 years.

THE COURT: And what does he do?

PROSPECTIVE JUROR NUMBER SIX: He's a tile setter.

THE COURT: Ever serve on a jury?

PROSPECTIVE JUROR NUMBER SIX: Twice.

THE COURT: Civil or criminal?

PROSPECTIVE JUROR NUMBER SIX: Both

THE COURT: Verdicts in both cases?

PROSPECTIVE JUROR NUMBER SIX: No. No they --

THE COURT: What happened?

PROSPECTIVE JUROR NUMBER SIX: Well, my daughter got sick and was in the hospital.

THE COURT: So you had to be replaced?

PROSPECTIVE JUROR NUMBER SIX: Uh-huh.

THE COURT: And what about the other case?

PROSPECTIVE JUROR NUMBER SIX: There was no verdict.

THE COURT: Unable to agree?

PROSPECTIVE JUROR NUMBER SIX: Uh-huh.

THE COURT: Hung jury?

PROSPECTIVE JUROR NUMBER SIX: Hung jury.

THE COURT: Was it a criminal or civil case?

PROSPECTIVE JUROR NUMBER SIX: Criminal.

THE COURT: Criminal. Thank you. How about other experience with the court system?

PROSPECTIVE JUROR NUMBER SIX: I've gone through workman's comp case.

THE COURT: You had your own case?

PROSPECTIVE JUROR NUMBER SIX: Uh-huh.

THE COURT: Was that over a work injury?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: And how did that resolve?

PROSPECTIVE JUROR NUMBER SIX: It went well. I got my medical benefits paid and everything.

THE COURT: All right. Did you have a lawyer?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: All right. And did you actually go to a hearing or was it resolved by agreement.

PROSPECTIVE JUROR NUMBER SIX: It was resolved. I didn't -

THE COURT: You didn't have to go to a hearing?

PROSPECTIVE JUROR NUMBER: No.

THE COURT: You didn't appear before an administrative law judge?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: All right. So would your evaluation of the process be that it was fair?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: And you're satisfied?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: How about any other court experience besides jury service?

PROSPECTIVE JUROR NUMBER SIX: That was it.

THE COURT: That was it. How about involvement in disputes, like, oh business or have a product that goes bad or get a traffic ticket that's wrong?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: Nothing.

PROSPECTIVE JUROR NUMBER SIX: Huh-uh.

THE COURT: All right. Any issues in your workplace, the school bus drivers ever go on strike or --

PROSPECTIVE JUROR NUMBER SIX: Well, I just started that because I worked for Frito Lay. And Frito Lay is very diverse. There's all different kinds of races that work together. And they all speak different languages.

THE COURT: They speak different languages.

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: And how do they get along in the workplace?

PROSPECTIVE JUROR NUMBER SIX: I never had any problems with anybody.

THE COURT: All right. Do the supervisors speak different languages or do they speak English?

PROSPECTIVE JUROR NUMBER SIX: They spoke different languages also.

THE COURT: All right. You've heard that there are damage claims in this case. Would you be willing to consider claims for damages?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: How about punitive damages?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: You'd consider that. Do you have any views about damages.

PROSPECTIVE JUROR NUMBER SIX: No, not really.

THE COURT: In other words, too little, too much, anything like that?

PROSPECTIVE JUROR NUMBER SIX: It depends on what I heard, you know?

THE COURT: Depend on the evidence.

PROSPECTIVE JUROR NUMBER SIX: Yeah.

THE COURT: And you're willing to follow the law?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: In this kind of a case, knowing what the case is about, could you hear the case with an open mind?

PROSPECTIVE JUROR NUMBER SIX: Yes, I could.

THE COURT: Is there any reason you'd be unable to serve?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: Thank you very much, Ms. Gomez. And we are now going to get the jury selection finished. Unless -- do you wish to inquire?

MR. SMITH: Yes, Your Honor. I do have one or two questions.

THE COURT: All right.

MR. SMITH: That's it.

Good afternoon again. I'm going to make this very quick because I know it's near the end of the day. I just have a couple of questions. And I'm going to direct them to Ms. Langley. If you don't mind, Ms. Langley. I was just reviewing your jury questionnaire. And I notice that you put down that you could not award emotional distress damages. Would you like to tell us about your feeling in that regard, please?

PROSPECTIVE JUROR NUMBER THREE: I just put no because I didn't know what else to put.

MR. SMITH: Okay.

PROSPECTIVE JUROR NUMBER THREE: Sorry.

MR. SMITH: Let me inquire. Do you believe that if someone has a claim that they have emotional injuries as opposed to physical injuries, that emotional injuries can be as real, even though you can't see it?

PROSPECTIVE JUROR NUMBER THREE: Sometimes they can.

MR. SMITH: Okay. And if someone came to your in this case and said, "I have emotional distress damages," do you have any thoughts about what your level or proof requirement would be of them, such as some other members of the prospective jurors who have said I need a doctor's report or whatever. Can you tell us how you feel about that?

PROSPECTIVE JUROR NUMBER THREE: Sorry, I work with doctors all the time. So -- I would probably -- it would depend on their level of convincing me on the stand, I guess.

MR. SMITH: I'm sorry. I'm having a hard time hearing you.

THE COURT: Their level of convincing me.

MR. SMITH: Oh, okay. And when you say level of convincing you, do you mean that you require anything other than just their own word that that is the case?

PROSPECTIVE JUROR NUMBER THREE: No. I just think that I -- it would depend on the person and how they testified on the stand. I mean, it -- if I believed they were truthful, then that's good enough for me.

MR. SMITH: Okay. Let me just ask you a couple of other questions. One other question. I notice you said something about your boyfriend's grocery store. Has there ever been any kind of claim, employment claims that you know about against his grocery store?

PROSPECTIVE JUROR NUMBER THREE: Just worker's comp.

MR. SMITH: Okay. Thank you, ma'am, I have no further questions.

THE COURT: Mr. Hahesy.

MR. HAHESY: Just a few, Your Honor.

Mrs. Gomez, on your questionnaire, you mentioned that you'd had -- you have a sister that had a problem with an employer. Can you tell me about how long ago this occurred?

PROSPECTIVE JUROR NUMBER SIX: Three or four years ago. And it was her attendance. I think I put that down.

MR. HAHESY: Was -- are you -- is this a sister that you're close to?

PROSPECTIVE JUROR NUMBER SIX: Yes.

MR. HAHESY: She -- do you remember what actually happened to her with respect to her employment?

PROSPECTIVE JUROR NUMBER SIX: She called off too many times.

MR. HAHESY: And what happened?

PROSPECTIVE JUROR NUMBER SIX: They let her go.

MR. HAHESY: Was there anything about that experience that she told you about that she felt was unfair.

PROSPECTIVE JUROR NUMBER SIX: No. I don't think she should have called off. It was her fault.

MR. HAHESY: So you felt that she was -- that it was her fault that she lost --

PROSPECTIVE JUROR NUMBER SIX: It was her fault that she got fired, yes.

MR. HAHESY: Now, you also mentioned that either you or someone close to you had been involved in bringing a formal grievance, claim or lawsuit against an employer.

PROSPECTIVE JUROR NUMBER SIX: That was my workman's comp case.

MR. HAHESY: That was your workers' comp case.

PROSPECTIVE JUROR NUMBER SIX: Yes.

MR. HAHESY: And about how long ago was that?

PROSPECTIVE JUROR NUMBER SIX: 2005

MR. HAHESY: And did you continue to be employed by Frito Lay after that case?

PROSPECTIVE JUROR NUMBER SIX: No.

MR. HAHESY: Did you -- why did your employment with Frito Lay end?

PROSPECTIVE JUROR NUMBER SIX: The job was physically demanding and I -- I couldn't perform that job any longer, so I decided to not to continue working with them.

MR. HAHESY: So other than the workers' comp claim against Frito Lay, did you bring any other type of claim or grievance against --

PROSPECTIVE JUROR NUMBER SIX: No. And I felt that I was, you know, dealt with fair. I mean, I don't have any grievance against Frito Lay. And if I had to recommend them for somebody to go to work with them, I'd say they're a great company to work for. I have no grievances with them. I thought I was dealt with fairly.

MR. HAHESY: The -- you mentioned that you sat on a couple of juries that were not able to reach a verdict. Is that correct?

PROSPECTIVE JUROR NUMBER SIX: That's correct.

MR. HAHESY: One of them you mentioned was a case involving discrimination or harassment.

PROSPECTIVE JUROR NUMBER SIX: A harassment -- it was a harassment case. But that's the civil case that I was dismissed from because my daughter had medical issues and so I left the case.

MR. HAHESY: All right. I have no further questions.

THE COURT: All right. We're now going to complete the jury selection, ladies and gentlemen.

(Passing the strike sheet again.)

MR. SMITH: Your Honor, I'd like to ask to be heard if the judge would allow us to approach for a moment.

THE COURT: Yes, you may approach.

(The following proceedings were held at sidebar with court and counsel)

MR. SMITH: I think we have a problem, Your Honor. I 'd like to make -- lodge a Batson challenge at this point. It seems that they're disproportionately targeting Latino people as to try to remove them from the jury. And I think that under the circumstances, we have no choice but to make a Batson challenge at this time.

THE COURT: All right. Let me see the strike sheet, please.

All right. The defendants have challenged prospective juror number six. All right. Mr. Hahesy, at this time, you have the opportunity to state the reasons for your challenge to each of the prospective jurors.

MR. HAHESY: I can do that. We've got the notes on them here, Your Honor.

THE COURT: Okay.

MR. HAHESY: On each one of them. On Roxanne Garcia, she was involved with a -- with her mother with a discrimination suit recently. She's very close

to her mother. She talked to her mother about that case, you know, regularly. She has regular contact with her mother who was involved in a race discrimination. And, you know, the impression that I developed from her is that there's still some lingering issues related to that case. She also, when she filled out the questionnaire, she didn't indicate, you know, that matter when she completed it and then when Your Honor asked her did she have any issues about discrimination or whatever, there was no question. And then I had to do the follow up to get that issue out. And so, you know, those are the reasons why we decided to strike her.

THE COURT: All right.

MR. HAHESY: Mr. Gomez, I got to remember my notes on Mr. Gomez.

MR. HO: Ms. Gomez.

MR. HAHESY: Ms. Gomez. She had the sister -- similarly she had the sister who was recently involved in the matter. She had had two cases, one of which she actually went to the -- through the trial. She was not able to have a verdict in that case. Her sister was fired. Her sister had an -- you know, problems with discrimination. Or not -- she indicated she filed a workers' comp claim involving the employer. And she has -- if I can remember, my notes on all of Gomez.

She also communicates, she worked in a workplace with many languages, never had a problem. Loved Frito Lay, loved working with all the people of the different languages. And so I felt there's enough ground there on potential bias right there.

MR. SMITH: May I address that briefly, Your Honor?

THE COURT: Yes. Well, let me get the rest of the reasons, then I'm going to let you respond.

MR. HAHESY: And then Lucatero was -- his father was very recently laid off. You know, he indicated that he was not, you know, frankly, I thought comfortable sitting as the juror. You know, he had indicated that, you know, the experience of his father getting laid off was something that bothered him and he was concerned about that. And then in his questionnaire, he indicated that it was a relatively recent layoff. And so given the fact this case involved a layoff.

(Off the record.)

MR. HAHESY: And just as to the Batson, our other strike was to the Caucasian employee. Frankly the plaintiffs have struck all Caucasian jurors. And so, Your Honor, we'd like to make the same Batson motion.

MR. HO: There's only Caucasians --

MR. HAHESY: Everyone they struck is a Caucasian. And so --

THE COURT: All right. Let me first have the response of the plaintiffs to the strikes that the defendant has made of the three Hispanic. And I will find this these are Hispanic jurors, each of them.

MR. SMITH: Yes, Your Honor. Let's start with Ms. Garcia. ms. Garcia stated that her sister had been terminated and then was her sister -- I'm sorry. Ms. Gomez. That it was her sister's fault and that there were no issues with respect to her sister. She was

specifically asked if there was any reason that she could not be fair given what had occurred with her sister. And she said no. There was no reason. Counsel has not advanced anything other than that for Ms. Gomez being dismissed.

And the mere fact that someone such as Ms. Gomez and Ms. Garcia both indicate that they work in a workplace where there's more than one language spoke indicates to me that there is some bias. Just by counsel's own words.

Now, with respect to Mr. Lucatero, Mr. Lucatero did say something about his father. But there was nothing in Mr. Lucatero's answer that indicated any kind of bias, and kind of pre-judged thought or anything else that I think would qualify him from being an exceptional juror in this case.

And the fact that four out of five -- three out of four jurors, prospective jurors are of Latino descent, I think is telling in the case where national origin is part of the claim. The claim in this case involves a significant number of Latina women and counsel has struck at least two Latina women in this case.

MR. HAHESY: Just if I may --

MR. SMITH: Disproportionate to the number of jurors sitting in the box.

MR. HAHESY. Batson gives us -- we get a right to make -- we have a prerogative to make strikes. And since this is a case involving layoffs, and it's also involving employment issues and we've got jurors who have family experiences involving employment issues, one involving a recently layoff of a father, one involving a sister who was terminated from the employment, according to the questionnaire.

We have sufficient prerogative to strike people, especially in employment case, if they've had, you know, those issues. And the law gives us that element of discretion and prerogative. Those are nondiscriminatory reasons for striking a juror.

THE COURT. All right. Let me get my jury sheet.

MR. SMITH: Your Honor, may we have a moment, we're getting our information regarding the jurors we struck.

THE COURT: Yes. Yes, you may. I'll get the information.

All right. Let me rule on these challenges. As I see the composition of the jury, we presently have 15 Caucasian prospective jurors and six Hispanic prospective jurors, although Mr. Veldstra's name could be perhaps Hispanic. He clearly is not Hispanic.

As to Ms. Garcia, the evidence shows that she has a mother who is involved in a racial discrimination claim. I found her manner to be very strange in responding to my questions. She didn't -- she was very, very quiet. I could barely hear her when she was responding. She was, quite frankly, very odd in her presentation and her affect.

She has indicated that, first when asked by me if there were any issues as to discrimination, whether there were any issues in her background. In effect, she did not disclose that there were any. She did not apparently -- I haven't seen her questionnaire, the fact that somebody who she's very close to, her mother, is going through employment discrimination issues of race right now.

And the Court is well satisfied that their are good reasons. I'm just going to say that in 17 and a half years as a trial judge, she is one of the oddest prospective jurors I've ever seen. I don't know whether it's a speech issue or whether it's a communication issue or whether she's just very shy. I'm not in any way being critical of her, but I did find her presentation of herself to be very, very different from anybody on this panel or any panel that I've ever had.

And given the fact that she has issues that, within her closest family, that go to what is in dispute in this case, it is not irrational nor is there any evidence whatsoever of racial animus associated with the challenge.

To the contrary, it would appear that she would likely be a sympathetic juror and someone who would essentially be influenced and affected by what's going on in her life with respect to her mother.

And although the bar seems to have been raised by the Supreme Court requiring a credible justification for the exercise of a peremptory, the Court Does find that as to Ms. Garcia, there is a credible basis on all the grounds stated and therefore the Batson challenge is denied.

As to Mrs. Gomez, Mrs. Gomez is a person who has worked currently as a school bus driver, but formerly as a person in the Frito Lay environment where there were multilingual workers and multilingual supervisors.

She stated that she has had her own workers compensation claim and did not go to trial, but it

went through the system. And she had a lawyer. She did say that she felt that she was fairly treated. She also has a sister who is apparently involved in a termination issue.

Essentially, quite frankly, the Court doesn't see this as anything having to do with race, but quite frankly, it's management versus labor and this is a person who's been making claims against her employer, herself, her sister's involved in a discrimination claim where claims are being made by her against an employer or a co-employee.

And I don't' know what -- to what extent this would be an influencing factor, but the fact that the supervisors are multilingual and she said that worked very well in the workplace at Frito Lay, thee is certainly a rational basis to say that she could impose that experience where she said it was, in effect, a wonderful work environment. It's a great company, she'd recommend it to anybody on this employment environment where, as I understand the evidence, NIBCO didn't have multilingual supervisors and, in fact, imposed this English requirement rather than to speak different languages. And that's going to be an issue in the case. But it's a very good reason for somebody who's found that to be a wonderful context.

MR. HO: If I may just say, Your Honor, there were multilingual supervisors at Nibco, but more to the point, I think there is so many multilingual workplaces in the state; if that were the criteria for exclusions, we would exclude half the possible jurors in the state.

THE COURT: Well, it isn't the only criteria, it is one of three different criteria that have nothing to do,

however, with -- we're focused on her race here. And whether that was the motivation for the challenge. In other words, as long as you have a facially valid reason that has some basis in logic and strategy, because we have eliminated the trial lawyer strategy and the individual experience and trial judgment of the trial lawyer to be able to select jurors and exercising a peremptory challenge, that the lawyer either feels would be favorable to the lawyer's case or unfavorable to the opponent's case.

On the totality of circumstances, I do believe that there is a basis for the exercise of the peremptory as to Ms. Gomez and I'm going to deny the Batson challenge.

As to Mr. Lucatero, really, the only thing we have on him that I can see is that his after was recently laid off. And that I don't have in my notes what the reason for the layoff was of the father.

MR. SMITH: Counsel didn't ask.

MR. HAHESY: The questionnaire indicates he was laid off. He lives with his parents. And this is --

THE COURT: Well, I will tell you that I don't really have enough of a basis. Mr. Lucatero seems to be a fairly straightforward fellow. If that's the only reason, I don't' think that his father's laid off is enough.

MR. HAHESY: Well, his father's laid off, he lives with his father. This is a lawsuit that involves claims relating to layoffs. And so given the nature of his family situation, there's a reasonable inference that could be drawn that he would come into this case with a set of, you know views or judgments relating to this own personal experience that he is

going through now with his family. He lives with his father, you know, and who's been recently laid off.

THE COURT: The problem is you didn't ask whether his father was suffering or whether he's been upset by it, whether there are any kinds of hard feelings or difficulties. Whether he thought it was fair or unfair.

MR. HAHESY: But I have his, you know, questionnaire. I mean, he indicates what the --

MR. SMITH: I disagree that he said -- that Mr. Lucatero said he made any kind of claim.

MR. HAHESY: Father got laid off because of no hours. both his parents are unemployed at this time. And --

MR. HO: There's no claim to be made there.

MR. HAHESY: Well, again, this is a case --

THE COURT: In other words, it sounds like he was laid off because there was no work for him.

MR. HAHESY: And that's the situation here where there was a slowdown in the business. People were laid off because of the slowdown of the business. And so, you know, when you have a case that involves claims relating to lay off, if you've got one of your jurors whose parent has undergone this event recently.

THE COURT: All right. I'm going to find that the facts are sufficiently analogous, in other words, a layoff because of a reduction in work and persons being out of work where the juror lives with his father. And that exact circumstance is being experienced.

There's certainly nothing racially charged or racially motivated against that and that's what Batson seeks to prevent. it doesn't seek to prevent the legitimate exercise of peremptory challenge for strategic reasons by a trial lawyer. Therefore I'm going to deny the Batson challenge on that.

Now, I recognize that there are , besides those three, only three other Hispanic jurors that are on the panel.

You're now exercising a Batson challenge for challenging Caucasians. However, those three would be people that they would not challenge logically for the reasons that you've challenged them. So there's no issue there. And what's the basis to say that there is any racially improper motive where we've got 15 out of the 21 jurors who are Caucasians?

MR. HAHESY: Well, I mean, I -- it's -- there's four jurors that they've kicked. All of them are women. Three of them are older white women who are managers.

THE COURT: They're managers.

MR. HAHESY: Own businesses.

THE COURT: In other words, just like I allowed you your strategic reasons. It's labor versus management. and you want to get rid of managers, quite frankly, if you're the claimant.

MR. HAHESY: If that's their justification for --

THE COURT: Well, we haven't heard the justification, but I'm assuming --

MR. SMITH: It was strategic, Your Honor, and that is in part some of the reasons that --

THE COURT: I am. I mean, I can't prevent you from making your Batson challenge if you're serious about it.

MR. HAHESY: I'm fine with the jury.

THE COURT: Let's do that. Let's finish the jury selection. I think that's a wise choice.

* * *

I, KAREN L. LOPEZ, Official Reporter, do hereby certify that the foregoing transcript as true and correct.

Dated: 03/10/2009

/s/ Karen L. Lopez

KAREN L. LOPEZ, RMR-CRR

Appendix D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

MARTHA RIVERA, et al.,	)	
Plaintiffs,	)	1:99-cv-6443 OWW SMS
vs.	)	SPECIAL VERDICTS
NIBCO, INC., an Indiana corporation,	)	OF TRIAL JURY
Defendant.	)	
	)	

We the jury in the above-entitled cause find the following answers to the questions submitted to us.

Question 1: On Plaintiffs' Title VII claim, do you find by a preponderance of the evidence that Nibco's Z test had a disproportionate adverse effect in causing the lay off of Hispanic and Asian employees?

PLAINTIFF	YES	NO
Alicia Alvarez	___	X
Eva Arriola	___	X
Peuang Bounnhong	___	X
Chhom Chan	___	X
Mao Her	___	X
Bee Lee	___	X
Paula Martinez	___	X
Maria Medina	___	X
Mai Meemoua	___	X
Margarita Mendoza	___	X
Bao Nhia Moua	___	X

Isidra Murillo	___	X
Maria Navarro	___	X
Vath Rattanatay	___	X
Martha Rivera	___	X
Ofelia Rivera	___	X
Sara Rivera	___	X
Maria Rodriguez	___	X
Maria Ruiz	___	X
Maria Valdivia	___	X
Sy Vang	___	X
Youa Xiong	___	X
See Yang	___	X

If you answered "yes" as to any plaintiff, answer Question 2. If you answered "no" as to all plaintiffs, answer Question 5.

Question 2: Has Nibco proved by a preponderance of the evidence that the Z tests were job related to and consistent with business necessity?

Yes __ No___

If you answered Question 2 "yes," answer Question 3. If you answered Question 2 "no," answer Question 5.

Question 3: Have Plaintiffs proved by a preponderance of the evidence that:

(a) a less discriminatory alternative selection method as defined in Jury Instruction No. 21, was available?

Yes __ No___

(b) Nibco refused to adopt the alternative selection method?

Yes __ No___

If you answered yes as to any of the Questions in Question 3, answer Question 4. If you answered no to any of the subsections to Question 3, answer Question 5.

Question 4: Was any disproportionate adverse effect of the administration of the Z test by Nibco a cause of the lay off of any plaintiff?

PLAINTIFF	YES	NO
Alicia Alvarez	___	___
Eva Arriola	___	___
Peuang Bounnhong	___	___
Chhom Chan	___	___
Mao Her	___	___
Bee Lee	___	___
Paula Martinez	___	___
Maria Medina	___	___
Mai Meemoua	___	___
Margarita Mendoza	___	___
Bao Nhia Moua	___	___
Isidra Murillo	___	___
Maria Navarro	___	___
Vath Rattanatay	___	___
Martha Rivera	___	___
Ofelia Rivera	___	___
Sara Rivera	___	___
Maria Rodriguez	___	___
Maria Ruiz	___	___
Maria Valdivia	___	___
Sy Vang	___	___
Youa Xiong	___	___

See Yang	___	___

Answer Question 5.

Question 5: As to plaintiffs' FEHA claims, did Nibco's administration of its Z test cause disproportionate adverse effect in causing the lay off of any plaintiff by reason of any plaintiffs' national origin?

PLAINTIFF	YES	NO
Alicia Alvarez	___	X
Eva Arriola	___	X
Peuang Bounnhong	___	X
Chhom Chan	___	X
Mao Her	___	X
Bee Lee	___	X
Paula Martinez	___	X
Maria Medina	___	X
Mai Meemoua	___	X
Margarita Mendoza	___	X
Bao Nhia Moua	___	X
Isidra Murillo	___	X
Maria Navarro	___	X
Vath Rattanatay	___	X
Martha Rivera	___	X
Ofelia Rivera	___	X
Sara Rivera	___	X
Maria Rodriguez	___	X
Maria Ruiz	___	X
Maria Valdivia	___	X
Sy Vang	___	X
Youa Xiong	___	X
See Yang	___	X

If you answered Question 6 "yes," as to any employee, answer Question 7. If you answered Question 7 "no" as to all plaintiffs, sign and return this verdict.

Question 6: Has Nibco established by a preponderance of the evidence that the Z test was job related and necessary to its business?

Yes __X__ No___

If you answered "yes," answer Question 7. If you answered "no," and answered Question 5 "yes," answer Question 8.

Question 7: If you found that Nibco's Z test was job related and necessary to its business, have plaintiffs proved that:

(a) There was an alternative employment practice that would have accomplished the business purpose equally well?

Yes __ No__X__

(b) Would this alternative employment practice have had less adverse impact on Hispanic and Asian employees?

Yes __ No__X__

If you answered Question 7 yes, answer Question 8. If you answered Question 7 no, sign and return this verdict.

Question 8: Was Nibco's Z test a substantial factor in causing the lay off of any Plaintiff?

PLAINTIFF	YES	NO
Alicia Alvarez	___	___
Eva Arriola	___	___
Peuang Bounnhong	___	___
Chhom Chan	___	___
Mao Her	___	___
Bee Lee	___	___
Paula Martinez	___	___
Maria Medina	___	___
Mai Meemoua	___	___
Margarita Mendoza	___	___
Bao Nhia Moua	___	___
Isidra Murillo	___	___
Maria Navarro	___	___
Vath Rattanatay	___	___
Martha Rivera	___	___
Ofelia Rivera	___	___
Sara Rivera	___	___
Maria Rodriguez	___	___
Maria Ruiz	___	___
Maria Valdivia	___	___
Sy Vang	___	___
Youa Xiong	___	___
See Yang	___	___

Sign, date and return this verdict.

We the jury in the above-entitled case have unanimously found the foregoing answers to the questions submitted to us in this verdict form. So say we all.

DATED: November 26, 2008. /s/ Albert Veldstra

Foreperson

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

MARTHA RIVERA, et al.,	)	
Plaintiff,	)	JUDGMENT IN A
vs.	)	CIVIL ACTION
NIBCO, INC.,	)	1:99-CV-06443
Defendant.	)	OWW/SMS
_____	)	

JURY VERDICT: This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdicts.

IT IS HEREBY ORDERED AND ADJUDGED that the unanimous verdicts of trial jury were returned in open court November 26, 2008, finding in favor of defendant Nibco, Inc and against each plaintiff on all of plaintiff's claims.

Judgment is entered in favor of defendant Nibco, Inc. and against each plaintiff: Martha Rivera, Mao Her, Alicia Alvarez, Eva Arriola, Peuang Bounnhong, Chhom Chan, Bee Lee, Paula Martinez, Maria Domitilia Medina, Mai Meemoua, Margarita Mendoza, Bao Nhia Moua, Isidra Murillo, Maria Navarro, Vath Rattanatay, Ofelia Rivera, Sara Rivera, Maria Rodriguez, Maria Ruiz, Maria Valdivia, Sy Vang, Youa Xiong, See Yang. Plaintiffs shall take nothing by their complaint. Defendant shall recover its costs of suit.

VICTORIA C. MINOR, Clerk
/S/ Alice Timken
DATED: December 1, 2008 By: Deputy Clerk

Appendix D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 09-15136

MARTHA RIVERA, et al.,

Plaintiffs-Appellants,

v.

NIBCO, INC., an Indiana corporation,

Defendant-Appellee.

Filed May 20, 2010

ORDER

Before: REINHARDT and HAWKINS, *Circuit Judges*, and SILER, *Senior Circuit Judge.*[*]

Judges Reinhardt and Hawkins have voted to deny the petition for panel rehearing. Judge Siler has voted to grant the petition for panel rehearing. Judge Reinhardt has voted to deny the petition for rehearing en banc, and Judges Hawkins and Siler so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has

[*] The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for rehearing and rehearing en banc are denied.